



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

WYOMING
STATE LAW LIBRARY

NOVA SCOTIA REPORTS

BK. 1883-84 VOL. 16

AUT. Russell & Geldert 4 VOL.

Acc. No. 28191 DATE Jan. 1936

Per. L. Can. A 75 d. 11

L.I.
Ow. Can.
Nov. 8 100

[illegible]

081001W
31412
VBA9811

Jan. 1936

CASES

1357

ARGUED AND DETERMINED

IN THE

4309

SUPREME COURT

OF

NOVA SCOTIA.

REPORTED BY

BENJAMIN RUSSELL, M. A.,

AND

JOHN M. GELDERT, Jr., LL. B.,

Barristers-at-Law.

16

VOLUME IV.

Carsonell Co. -

1883-84.

HALIFAX, N. S.:

A. & W. MACKINLAY,
PUBLISHERS.

1885.

28191



ORMOND
STATE
VASSALL

JUDGES OF THE SUPREME COURT

DURING THE

PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

Chief Justice.

THE HONORABLE JAMES McDONALD.

(Appointed May 20th, 1881.)

Judge in Equity.

THE HONORABLE ALEXANDER JAMES.

(Appointed Assistant Judge January 8th, 1877. Appointed Judge in Equity July 24th, 1882.)

Assistant Judges.

THE HONORABLE HUGH McDONALD.

(Appointed November 5th, 1873.)

THE HONORABLE HENRY W. SMITH.

(Appointed January 15th, 1877.)

THE HONORABLE ROBERT L. WEATHERBE.

(Appointed October 7th, 1878.)

THE HONORABLE SAMUEL G. RIGBY.

(Appointed December 17th, 1881.)

THE HONORABLE JOHN S. D. THOMPSON.

(Appointed July 24th, 1882.)

Attorney General.

THE HONORABLE ALONZO J. WHITE.

(Appointed August 3rd, 1882.)

ERRATA.

Page 150, fourteenth line from the bottom, for "sure way" read "summary way."

" 151, twentieth line from the bottom, for "made by them" read "made to them."

LIST OF CASES.

	PAGE
Almon v. British America Assurance Co.....	43
Almon v. Providence-Washington Insurance Co.....	533
Andrews v. Landers.....	236
Archbold v. Merchants Marine Insurance Co.....	98
Bank of British North America v. Bell.....	121
Bank of Nova Scotia v. Forbes.....	295
Bank of Nova Scotia v. Smith.....	146
Berry v. Berry.....	66
Card v. Weeks.....	93
Carney v. Phalen.....	126
Chesley v. Gavaza <i>et al.</i>	530
Collie v. Bell.....	134
Corbett v. McKenzie <i>et al.</i>	50
Corbett v. O'Dell.....	144
Corbett <i>et al.</i> v. Stronach <i>et al.</i>	169
Crittendon v. Municipality of Guysborough.....	62
Crosskill v. Morning Herald Printing and Publishing Co.....	200
Cummings v. Gladwin.....	168
Currie v. LeCras.....	31
DesBarres v. Tremaine.....	215
Devers v. Gavaza.....	167
Dickie v. Merchants Marine Insurance Co.....	244
Dickie v. Woodworth.....	105
Eaves v. Darling.....	128
Ernst v. Waterman.....	272
Esson <i>et al.</i> v. Wood.....	276
Foyle v. Bingham.....	404
Gold Mining Areas, Waverley, <i>In re.</i>	280
Gregory v. Halifax and Cape Breton R. Co. <i>et al.</i>	436
Halifax Banking Co. v. Worrall <i>et al.</i>	482
Harrison v. Harrison.....	338
Holdsworth v. Russell.....	184
Hubley v. Boak.....	82
Johnston v. McLean.....	91
Jones <i>et al.</i> v. Kinnear <i>et al.</i>	1

	PAGE
Kearney <i>v.</i> Creelman <i>et al.</i>	228
Knaut <i>v.</i> Sponagle <i>et al.</i>	193.
Lawlor <i>v.</i> Mumford.....	35.
LeCain <i>v.</i> Wieland	71
Leith <i>v.</i> Trott.....	120.
Louisburg Land Co. <i>v.</i> Tutti.....	401
Mahon <i>v.</i> Gammon.....	232
Marshall <i>v.</i> Anderson.....	431
Marter <i>v.</i> Pryor.....	498
McDonald <i>v.</i> Neville.....	191
McFatrige <i>v.</i> Carvell.....	286
McKay <i>v.</i> Moore <i>et al.</i>	323
McKay <i>v.</i> Woodill.....	55
McKilligan, <i>Re</i> Estate of.....	496
McKinnon <i>v.</i> McNeil <i>et al.</i>	25.
Miller <i>v.</i> Ling.....	135.
Millet <i>v.</i> Lordly.....	309
Morgan <i>v.</i> Rice.....	368
Oakes <i>v.</i> Keating <i>et al.</i>	554
O'Kell <i>v.</i> Bell.....	419
O'Toole <i>et al. v.</i> Wallace <i>et al.</i>	357
Overseers of Poor, Bridgewater, <i>v.</i> Overseers of Poor, Port Medway....	88
Overseers of Poor <i>v.</i> Davidson.....	58
Pullen <i>v.</i> Sanford.....	242
Purdy <i>v.</i> Mathers.....	398.
Queen <i>v.</i> Elze.....	130
Queen <i>v.</i> Miller.....	361
Queen <i>v.</i> Warden and Council of Darmouth.....	173
Queen <i>v.</i> Robin <i>et al.</i>	91
Ray <i>v.</i> Corbett.....	407
Rodgers <i>v.</i> Jones.....	96
Rumsey <i>et al. v.</i> Merchants Marine Insurance Co.....	220
Seamen <i>v.</i> Porter.....	292-495
Starr <i>v.</i> Heales.....	84
Stephen <i>et al. v.</i> Gavaza <i>et al.</i>	514
Symonds <i>v.</i> Beckett <i>et al.</i>	396
Thompson <i>v.</i> Ellis.....	307
Walker <i>v.</i> City of Halifax.....	371
Windsor & Annapolis Railway, <i>In re</i>	312
Wood <i>v.</i> Smith	37

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM COMMENCING

DECEMBER 1882;

(Continued.)

JONES ET AL v. KINNEAR ET AL.

Before McDONALD, SMITH, and WEATHERBE, J J.

(Decided December 18th, 1882.)

Presumption as to advancement.—Evidence of circumstances to rebut it.

THE testator, desiring to invest money in the Savings' Bank and in Dominion five per cent stocks, ascertained that he could not invest more than \$1000 in the five per cents in his own name, nor more than \$10,000 in the four per cents. After investing up to the limit in both the four and five per cents in his own name, he withdrew part of the four per cents and purchased stock, for which he obtained certificates in his own name as trustee for his daughters and his wife, and also invested money in the four per cents in the same way. Separate pass-books were prepared for the moneys invested in the names of the daughters, on which their names were separately written by his direction. Before thus investing the money he learned, in answer to inquiries, that he would have full control of the money invested by him as a trustee. In entering the sums in his private book he mixed them all with his own money and passed the interest to his own credit. On one occasion, in mentioning to his wife the fact of these investments being made, he said he did not know how the money would stand and that he would have to see his solicitor about it; but the codicil, afterwards drawn up, made no mention of these moneys. These circumstances were relied on to rebut the presumption of an advancement. On the other hand he, on several occasions, told his wife that he had put such and such moneys in the Savings' Bank for Beatrice or for Dora, (the daughters,) and on one occasion, referring to a mortgage he was about to take up, he told his wife that he did not intend to touch her money or the children's, but to pay it off out of his own.

Held, reversing the decision of RITCHIE, E. J., that the evidence given as to the circumstances under which the deposits were made, did not rebut the presumption that the money was intended as an advancement to the children.

This was an appeal from a decree based upon a decision of the learned Judge in Equity. Plaintiffs, as Executor and Executrix of the last will and testament of Thomas C. Kinnear,

late of the City of Halifax, deceased, brought a suit in Equity with the view of procuring the instructions of the Court under circumstances set out in their bill, as follows :—

That on the second day of December, A. D. 1878, the testator deposited in the Government Savings' Bank, at Halifax, in his own name, but as trustee for Theodora Clifford Kinnear, the sum of one thousand dollars, which remained on deposit until the sixth day of January, A. D. 1879, when he withdrew the said money and purchased one thousand dollars worth of B. five per cent. stock, issued by the Government of Canada, and caused the certificate therefor to be taken in his own name as trustee for the defendant, Theodora Clifford Kinnear, and on the said second day of said month of December, the said testator deposited in the Government Savings' Bank at Halifax, in his own name, but as trustee for Beatrice Emily Kinnear, the sum of one thousand dollars, which remained on deposit until the sixth day of January, A. D. 1879, when he withdrew the said money and purchased one thousand dollars worth of B. five per cent. stock issued by the Government of Canada, and caused the certificate therefor to be taken in his own name, as trustee for the said defendant, Beatrice Emily Kinnear, and at the time of his death the said stock stood respectively as aforesaid.

That on the thirtieth day of August, A. D. 1879, the said testator deposited in the Government Savings' Bank at Halifax, the sum of five thousand dollars, in his own name, but as trustee for the defendant, Beatrice Emily Kinnear; and on the second day of January, A. D. 1880, he deposited the further sum of five thousand dollars in the same way, and at the time of his death there was standing to the credit of said testator, as trustee for said defendant, Beatrice Emily Kinnear, on the books of the Government Savings' Bank at Halifax, the sum of ten thousand dollars principal, exclusive of interest.

That on the twenty-fourth day of September, A. D. 1879, the said testator in like manner deposited in said Government Savings' Bank at Halifax, the sum of five thousand dollars, and on the second day of January, A. D. 1880, he deposited the further sum of four thousand dollars in said Government

Savings' Bank at Halifax, both of which last named sums he caused to be deposited in his own name, but as trustee for the defendant, Theodora Clifford Kinnear, and at the time of his death there stood upon the books of said Government Savings' Bank at Halifax, the sum of nine thousand dollars, exclusive of interest, in the name of said Thomas C. Kinnear, as trustee for said defendant, Theodora Clifford Kinnear.

That no reference was made to the said sums or to said stock certificates in the will of said Thomas C. Kinnear, nor in any paper left by him, so far as the plaintiffs up to this time have been able to ascertain. That after the procuring of said certificates and the depositing of said moneys, the said Thomas C. Kinnear made and executed a codicil to his said will, but in the said codicil no reference whatever was made to said moneys or certificates, or to said defendants, or either of them, except that by said codicil which was executed by him in February, A. D. 1880, he appointed plaintiffs guardians of said defendants.

And the plaintiffs say that they have been notified and requested by the parties interested in said residue other than the defendants, to place the amounts represented by the said stock certificates and the said sums so on deposit, as aforesaid, in the inventory of said estate, and the said parties have claimed, and do claim, and insist that the said moneys so on deposit as aforesaid, and the sums represented by said certificates belong to and form part and parcel of the estate of said testator, and did not and do not belong to said defendants or either of them, and the said parties so claiming, as aforesaid, allege and insist that the said Thomas C. Kinnear made the said deposits in the manner and form above stated as a matter of convenience for himself, because, as they alleged, under the regulations governing said bank he could not, in his own name, have more on deposit in said bank at one time than ten thousand dollars, and that at that time he had that sum on deposit in his own name there, and that such deposits and purchases of stock were made by said testator without any intention on his part to create a trust in favor of said defendants or either of them.

And the plaintiffs further say that they occupy to some extent in relation to said defendants and to said estate and to said sums of money an inconsistent or adverse position, and they are advised by counsel and do believe and aver that they cannot safely deal with said sums of money or any of them without the order or decree of this Honourable Court instructing and directing them how to dispose of and apply the same.

Wherefore they pray that this Honourable Court will be pleased to decree and declare to whom the said sums of money represented by the said deposits and the said stock certificates respectively belong, and that it will further decree and declare how and to whom and for whose use and benefit the said respective sums of money should be used and applied, and will cause such enquiries and references to be had and made and such orders, declarations and decrees made as may be necessary to protect the plaintiffs in the premises, and as may also be necessary to declare and establish the respective rights of all parties interested in said funds and as may be agreeable to equity and good conscience.

The infant children of the testator appeared by their guardian *ad litem*, and, having no knowledge of the truth of the allegations in the plaintiffs' bill contained, neither admitted nor denied the same, but requiring proof thereof, submitted themselves to the jurisdiction of the Court. Florence Lewes and Georgina Croker King, married daughters of the testator, with their husbands, also appeared as defendants to the suit, and, on the grounds referred to in several clauses of the bill, prayed the Court to decree that the said stocks and the said sums in the Savings' Banks should form part of the estate of the late Thomas C. Kinnear, and be distributed as the residuary estate was required to be distributed by the will of the said Thomas C. Kinnear.

Evidence was taken on behalf of the parties to the suit before William Twining, Esq., one of the Masters of the Supreme Court, but as the evidence is fully stated in the judgment of the learned Judge in Equity, it is not considered necessary to set it out at greater length, except so far as regards the evidence of the widow of the testator, which was as follows :—

Emily Kinnear, sworn, examined by *J. N. Ritchie*.—I had conversation with Mr. Kinnear on the subject of this money deposited in the Savings' Bank on one occasion. It was a few days before his death, in reference to the purchase of this house, when I asked him how he was to pay for it, and he said he intended to release the mortgage on the house and pay the balance out of the money in the Savings' Bank. I asked him if it was my money? When he said no, he did not intend to touch my money or the children's, but to release the mortgage and pay for it out of his own money in the Savings' Bank. That was all that was said. The amount of purchase money of the house was twelve thousand dollars. Nothing was said particularly about the money of the children in the Savings' Bank. When Mr. Kinnear first deposited the money in the Savings' Bank, he shewed me the certificates in the names of the children and myself. He spoke of it from time to time, but I never paid much attention to it. At the first time he said that they had refused to take over ten thousand dollars in his own name, and in case of his death, he did not know how the money would stand, and to remind him to see Mr. Meagher about it.

Cross-examined by S. G. Rigby.—Mr. Meagher was acting for Mr. Kinnear at that time, and arranging a codicil for his will. The mortgage on the house was one of my mortgages. Mr. Kinnear said the house was to be mine as long as I chose to live in it or to rent it; but if I wished to leave the country and sell it, it would then revert to his estate. That arrangement was not carried out. The deed was not signed before he died. It had been sent to be signed but had not been returned. He told me on subsequent occasions,—on several occasions,—that he had put so much more in the Savings' Bank for Beatrice or for Dora, my daughters, and said nothing more about it. When I asked him if he was going to take my money out of the Savings' Bank he said he had plenty more money there, and was going to take it out of his own money. He kept me constantly informed about his investments and his money affairs.

The judgment appealed from, after setting out the statements contained in the plaintiffs' writ, proceeds as follows

Mr. Kinnear's will is dated 4th April, 1878, one codicil is dated the 26th October, 1878, and the last on the 20th January, 1880; he died in the following February. Mr. Wallace, the Assistant Receiver General and Manager of the Dominion Savings' Bank, proved the entries of monies deposited in the Bank by Kinnear in his own name and in trust for the others during the years 1878, 1879, and part of 1880, and that the limit of any one depositor in the Savings' Bank by his instructions is \$10,000 for any one depositor, and \$1,000 is the limit of five per cents stock which can be held by any one person, and that on the 25th of August, 1879, there was standing to the credit of Mr. Kinnear, in the books of the Savings' Bank, \$10,000 $\frac{1}{2}\%$, that his first deposit thereafter as trustee for Beatrice Emily Kinnear was on the 30th of August, 1879, of \$5,000, and for Theodora Clifford Kinnear was on the 24th of September, 1879, of \$5,000; that the first deposit made by him was on the 2nd of December, 1878, of \$1,000 for each of his daughters, and on the 6th of January following he withdrew these sums and took five per cent. stock for them, and took two stock certificates, one as trustee for Theodora, and the other for Beatrice, on the same day there was granted to him two other stock certificates, one for himself, and the other for Emily Kinnear, his wife. Mr. Wallace himself seems to have had no communication with Mr. Kinnear on the subject; his knowledge is derived solely from the entries in the books of the Bank. John H. Balcom, a teller in the Bank, remembers Mr. Kinnear coming to the bank in December, 1878; he enquired about the rules and got a copy of them; no deposit was then made; he came a short time after and made three deposits, one of \$3,000 on his own account, and two others of \$1,000 each; he could not remember what he said at that time, he was trying to find out the best terms of investing moneys there. He said he had moneys coming in and he could not get any better investment for them; he was told that \$1,000 was all he could have in one name in the five per cents, and \$10,000 in the four per cents, that was before the deposits were made. As to drawing out money he was told that he could control anything he had in trust in the same way that he could control his own money. On his cross-examination he said he was not sure that Kinnear got a copy

of the rules; he did not recollect the conversation with him distinctly, except from the impression it left on his mind; it was seldom he came in that he did not ask questions. Arthur C. Johnston, a clerk in the bank, remembers Mr. Kinnear coming to the bank about the time the three first accounts were opened; he wanted to know how much he could deposit in his own name in the Savings' Bank and Stock. He was told \$1,000 in the five per cents, and \$10,000 in the four per cents in his own name. He, witness, was under the impression that he was told he could deposit any amount in his own name in trust, and also that he could open as many accounts of \$1,000 each, in trust, in the five per cents as he chose; it was after that conversation he made the deposits; he asked if he could have the full control of trust deposits in the same way as of those in his individual name, and he was told he could. On cross-examination he said he was the accountant; that the conversation spoken of was the same as Balcom had just spoken of; he would not swear positively, as to the conversation about the limit of the amounts that could be deposited, but he is positive he asked as to the control of them. James Sweet kept Mr. Kinnear's books; he produced his private account book; he pointed out the entries relating to the money deposited in the Savings' Bank; the entries were made by him by Mr. Kinnear's directions, and were made, as he thinks, at the time the deposits were made; he had the custody of the pass-book, and wrote the names Beatrice Kinnear and Theodora C. Kinnear on those books, respectively by Mr. Kinnear's directions; he also produced a memorandum book of Mr. Kinnear's, in his own hand-writing.

The entry in the private account in Mr. Kinnear's own hand-writing, is as follows:—

1878, Dec. 2, deposit of \$5,000 Dominion Government Savings' Bank this date
\$3,000 in my own name.
\$1,000 in my own name, Beatrice Kinnear.
\$1,000 in my own name, Theodora Kinnear.

\$5,000 at 4 per cent.

1879, Feb'y. 21, \$5,000 at 4 per cent.

Then follows, in pencil, the name of Emily Kinnear at 5 per cent.

1 do. in my name at 5 per cent.

1 do. in my name at 4 per cent.

The other entries in Mr. Kinnear's private account, referred to by Mr. Sweet, as made by him, by his, Mr. Kinnear's, directions, are as follows :—

1879, Aug. 30, deposited in Government Savings'	
Bank on account of Beatrice Kinnear	\$ 5000
Sept. 21, do. do. account, Theodora Clifford Kinnear.	5000
1880, Jan'y. 2, do. do. account Beatrice Kinnear....	5000
" " do. do. account Theodora C. Kinnear.	4000
Savings's Bank certificate 5 p. c. Stock, Jan. 3, 1879.	
4 certificates of \$1000 each in Government Savings'	
Bank	4000
1879, Feb. 31, \$6000 at 4 per cent interest	6000
July 29, withdrawn	1000
Aug. 25, deposited this date	5000
\$1,100 of this in the name of Emily Kinnear	6000
	<hr/>
	11,000
1880, do. do. do.	5000
Add interest on T. C. K's book to June 30, 1879....	106 85

Both the plaintiffs were examined. Mr. Jones produced Mr. Kinnear's will and two trust deeds, in all of which provision was made for his wife and these two children. He knew nothing of these deposits made in his daughter's name except from the books. The interest on these stocks was drawn by Mr. Kinnear himself, and went into his general accounts. He produced a book which he said was in Mr. K.'s handwriting. Page — is in his handwriting. The first entry is as follows, in pencil :—

"Jan. 2, 1880.—Deposited in Savings' Bank, in name of Beatrice Kinnear, \$5,000; in name of Theodora Kinnear, \$4,000, at 4 per cent."

Mrs. Kinnear testifies to conversation she had with her husband a few days before his death, in reference to the purchase of a house; she had asked him how he intended to pay for it; he replied that he intended to release the mortgage

on it, and pay the balance out of the money in the Savings' Bank ; she asked him if it was out of her money ; he replied no, he did not intend to touch her money or the children's ; that was all that was said ; the amount of the purchase money of the house was \$12,000 ; nothing was said particularly about the money of the children in the Savings' Bank. She went on to say that when Mr. Kinnear first deposited the money in the Savings' Bank he shewed her the certificates in the names of the children and herself ; he spoke of it from time to time, but she never paid much attention to it ; at the first time he said that they had refused to take over \$10,000 in his own name, and in the case of his death he did not know how the money would stand, and to remind him to speak to Mr. Meagher about it ; Mr. Meagher at that time was acting for Mr. Kinnear, and arranging a codicil for his will ; on several occasions he told her that he had put so much more in the Savings' Bank for Beatrice or for Dora ; when she asked him if he was going to take her money out of the Savings' Bank he said he had plenty more money there, and was going to take it out of his own money. She had before said that the mortgage on the house was one of her mortgages. It was one of the securities assigned by Mr. Kinnear in trust for her and her children, Beatrice and Theodora. Under this evidence it is contended that the money so deposited, and stock so taken should form part of the estate of Mr. Kinnear, on the ground that no intention ever existed on his part to divest himself of the property, the investments having been made in the name of his daughters, under the impression that he could not make them in his own name. Such an investment, made in the name of children by their parent, would, under ordinary circumstances, be presumed to be intended as an advancement to them, and it would be for those who would rebut that presumption to shew a contrary intention on the part of the parent, which might be done by shewing under what circumstances the investment was made, and the acts and declarations of the party making it ; but such declaration, in order to rebut such a presumption, must be contemporaneous with the investments. The impression which the evidence in this case has made upon my mind is that Mr. Kinnear had no intention whatever of divesting himself of the funds which he invested

in the names of his two infant children, but made the investment in their names of his money when he found that a difficulty existed in making it in his own name. His conduct when he made the investment indicated this. Before doing so he went to the bank to enquire about the rules; he said he had moneys coming in, and he could not get any better investment for them; he was then told that \$1,000 was all he could invest at 5 per cent., and \$10,000 at 4 per cent., in one name. It was not till the deposits in his own name reached the last-mentioned sum that any deposits were made in the name of his daughters, and not till then it appears to have been intimated to him that he could make further deposits in other names; but even then he forbore making them in the name of his daughters, till he had ascertained that he would have entire control of the money so invested. Immediately after having done so he has the entries made in his book containing an account of his securities, and having inscribed on it memorandum of stock, &c., held by T. C. Kinnear, mixing up and adding together the money invested in his own name with that in the name of his daughters, and when the interest became due he received it and passed it to his own credit. His receiving the interest of itself would amount to nothing, but passing it to his own credit shewed, under the circumstances, that he considered himself the owner of the fund. If he had intended otherwise, so correct a man of business as he was would have opened an account, and placed the amount to their credit. It is obvious from the provisions of his will and the terms of the trust deeds by which ample provision was made for these daughters, that the funds should be held in special trusts, while as regards this investment there were no special trusts. and no trustees but himself, and he an aged man. He had commenced making these deposits before he made the last trust deed in their favor, and his last deposit was made just before he made his last codicil, and Mrs. Kinnear tells us that Mr. Kinnear had said to her that they (referring to the officers of the bank,) had refused to take over \$10,000 in his own name, and, in case of his death, he did not know how the money would stand, and to remind him to see Mr. Meagher about it, who at that time was acting for him, and arranging a codicil for his will, and

yet this codicil, made by Mr. Meagher, has no reference to this money. Surely if he had intended it for these children he would have had the doubts in his mind removed by declaring his intentions in their favor. There is a sentence in Mrs. Kinnear's evidence which might seem to lead to a different conclusion from this at which I have arrived. She says that on several occasions her husband told her that he had put so much more money in the Savings' Bank for Beatrice or for Dora, but I cannot lay much stress on this. She says Mr. Kinnear kept her constantly informed about his investments and his money affairs. She had previously said that when he had first deposited the money in the Savings' Bank he shewed her the certificates in the names of the children and herself; he spoke of it from time to time, but she never paid much attention to it. It is not to be supposed that the very words used by Mr. K. would be remembered by her. If, therefore, he had used the expression, "I have put so much more in the Savings' Bank in the name of Beatrice or Dora," it would be consistent with all the other evidence; and it was on the first occasion of these investments that he had told her he could not invest more than \$10,000 in his own name. It must have been pretty evident that if he could have invested the rest of his money in his own name he would have done so.

Numerous cases were cited on both sides at the argument, but all of them recognize the principle that money belonging to a person, invested by him in the name of another, will, as a general proposition, enure for the benefit of the party making the investment; it would be presumed, in the absence of any evidence to the contrary, that such was his intention, and that it was so made to answer a collateral purpose. If, however, as in this case, the investment is made in the name of children, it will be presumed that it was intended as an advancement and provision in discharge of a moral obligation,—a tribute of affection,—unless by the evidence adduced and the circumstances attending the investment, that presumption is rebutted. In either case it becomes a question of intention. In *Marshall v. Cruswell*, L.R., 20 Eq., 328, Sir G. G. JESSEL, M.R., says: "As I understand it the law is this,—the mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a

resulting trust in the favor of the purchaser if the surrounding circumstances tend to the conclusion that a trust was intended, although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift; yet you may take the surrounding circumstances into consideration so as to say it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration so as to say that a purchase in his name is a gift, not a trust." I have viewed the case in this light, and I think that the presumption of this investment being intended as an advancement or gift to these children has been rebutted by the evidence adduced.

An objection was taken by Mr. Rigby that if Mr. Kinnear invested in the names of his two children because he could not invest more money in the Savings' Bank, it was an evasion of the law, and the property therefore vested absolutely in the children. There are cases in which it has been held that no trust will result if the policy of an Act of Parliament would be thereby defeated; thus, for instance, it has been held that the whole effect of the act relative to the registry of shipping would be destroyed if a ship held and registered in the name of one could enure for the benefit of another, the object of the act being to secure evidence of the title from its origin, to see how far throughout it has been British owned. See *Ex parte Yallop*, 15 Ves., 85; and *Ex parte Haughton*, 17 Ves., 254. So also under 7 & 8 William III., chapter 25, relating to conveyances multiplying votes, and the 10th Anne, chapter 23, whereby all conveyances made to qualify anyone to vote, subject to a condition to defeat the same, shall be discharged from such condition. By the very terms of these acts a resulting trust is excluded, but in *Childers v. Childers*, 1 DeG. & J., 482, the plaintiff, the father, desiring that his son should be qualified to be elected to the office of Bailiff of the Corporation of Bedford Level, under the Act of Parliament, made a voluntary conveyance to the son for that purpose. The court held that the son should be declared to be a trustee of the land for the plaintiff, it appearing that the father had no intention of giving up the beneficial ownership, and there having been no fraud or deception on his part. But the case of *Field v. Lonsdale*, 13 Beav., 78, is a case strictly in point. By the English Act

relating to Savings' Banks, they were not to receive from any one depositor more than £150 in the whole, and when the deposit and interest amounted to £200 the interest to cease. Field had deposited the amount limited in his own name, and being unable to make any further deposits in his own name, he opened another account in his name in trust for his sister, Elizabeth Field, he retaining control over the whole fund. It was held by Lord LANGDALE, M. R., that his sister, on the death of the depositor, was not entitled to the money invested in her name. His Lordship said: "I think that the only intention was to evade the provisions of the Act, and not to create a trust; the declaration, therefore, is ineffectual, and the claim must be dismissed." In the present case Mr. Kinnear used no deception, and what he did was done after he had ascertained from the officers of the bank that, though he could not invest more than a certain sum in his own name, he could do so in the name of others, and I can see no violation of the law in what he did. In the Dominion Act relating to Savings' Banks there is no limitation as to the amount any one depositor may make. It is true that by the Act it is contemplated that regulations were to be made by the Governor-in-Council, which were to be published and laid before Parliament, and by these the officers of the bank, as well as others, would be bound; but from the terms of the letter from the Auditor to Mr. Wallace, no limitation of deposits could have been made by any such regulations. This letter is produced by Mr. Wallace as containing the instructions under which he acted, and is to this effect:—

SAVINGS' BANK BRANCH,
Ottawa, 11th January, 1878. }

SIR,—I have the honor to instruct you, for your further guidance, that if any depositor, having already at his credit \$1,000, the maximum sum allowed, should offer a further sum to be deposited, you may accept such deposit, pending the sanction of the Hon. Minister of Finance. If he object to receive the excess, the amount is to be withdrawn, no interest being allowed thereon. In every such case you would have to report immediately to this department.

All this would have been in violation of any regulation of the Governor-in-Council, limiting in terms the amount to be deposited by any single depositor. I must infer that none such existed; certainly no proof has been adduced of its existence.

The decree will be that the money invested by Mr. Kinnear in the Dominion Savings' Bank in his own name, in trust for his two daughters, Beatrice Emily Kinnear, and Theodora Clifford Kinnear, was so invested by him for his own benefit, and that the same belonged to him in his life time, and now forms part of his estate, and that the costs of the several parties to the suit be paid out of the estate.

A decree was made accordingly, from which an appeal was taken, on the part of the infant children, on the grounds following :—

1. That the moneys in question, having been deposited in said stock and deposited in said Savings' Bank by the deceased, in his own name, in trust for your petitioners, the presumption of law is that he intended the same as gifts or advancements to your petitioners, and such presumption is not rebutted by the facts proved.

2. That the facts referred to in the judgment as affording sufficient evidence to rebut the presumption that the stock and moneys in question were not intended as gifts or advancements, were not sufficient to rebut such presumption.

3. That the facts proved strengthen the presumption that the stock and moneys in question were intended as gifts or advancements to your petitioners.

4. That the deceased having made a codicil to his will after the last instalment of the moneys in question was invested in stock or deposited in the Savings' Bank, in which codicil he confirmed the prior bequests made to your petitioners, it is to be presumed that the said stock and moneys were intended as gifts to your petitioners.

5. That it is not to be presumed as against the presumption of law that the stock and moneys in question were intended as gifts to your petitioners, that the deceased purchased said stock and deposited said moneys upon pretended trusts for the purpose of evading the rules and regulations by which such investments were controlled.

6. Because it is not to be presumed, as against the aforesaid presumption of law, that if the testator intended to purchase said stock and deposit said moneys in trust for himself, he would have selected your petitioners as trustees.

The appeal was argued February 1st, 1882, by the Attorney-General, in support of the appeal, and by Ritchie, Q. C., (with whom was James Thomson, Q. C.,) *contra*.

Attorney-General, for guardian, *ad litem*, of the children.—At the time that the testator put the \$1,000 in the Savings' Bank, on deposit in the name of Beatrice E. Kinnear, he could have put that \$1,000, and the \$1,000 for Theodora C. Kinnear,—he could have deposited it in his own name, as he had a margin of \$7,000. (*Ritchie, Q. C.*—The reason for this was that he had to have these amounts there one month, in order to obtain stock certificates, the limit of which was \$1,000. He also bought stock for himself at the same time that he bought stock for the two children.) The very fact of his having made, as he did, a settlement for these children, shews that it was his intention, from time to time in his lifetime. The setting apart of these funds was just of a piece with his mortgage, a trust deed in their favor. (*WEATHERBE, J.*—What is the position of a case coming from the Equity Judge? Does the fact of his finding one way or the other affect the matter.) It comes before this Court just as it came before him. It is not analagous to setting aside a verdict. The legal presumption is in our favor that he deposited the money for them. There is no evidence to break down that presumption. A man will not be allowed to defeat the presumption arising from this transaction by alleging that he is doing it in violation of law. *Gallagher v. Taylor*, on appeal, per GWYNNE, J. In the case in *13 Beau.*, cited by the Judge in Equity, the distinction is that the depositor went on depositing after one of the *cestuis que trustent* was dead. There was no person for whom the money could enure as to her case. That was held to show an intention to evade the law and deposit it for his own benefit, and that intention, evident as to one of the *cestuis que trustent*, was a guide to the intention as to the other. The trust was not communicated to the parties. Here it was communicated. There the point was not taken that

the testator could not be allowed to say that he intended to evade the law. In this case the Judge decided that there was not evidence of the desire to evade the law; that is, there is not evidence that this was against the law. If it was not, if there was not such a regulation, the strength of their argument is gone. (*Thomson, Q. C.*—It was an evasion of their rules, but not of the law. WEATHERBE, J.—He was depositing money against the rules, under false pretences, unless he is held to have deposited for the daughters.) By his codicil, made after those deposits in his daughters' name, he re-affirms his will. The Judge below concludes that there is no regulation violated by Kinnear, assuming that he deposited this money for himself. Before he reached at all the limit of his own money, he commenced to deposit for his daughters. The only explanation of that, that he deposited there for the sake of getting the 5 per cents for them, is based on mere conjecture. It is argued that he was required to have the money in the 4 per cents before putting it in the 5 per cents. There is no evidence of such a regulation, or that such a regulation was communicated to him. Balcom's evidence is only of impressions, and Johnston's is of the same character, and Balcom did not think of the conversation from which he gathered that impression, until after he saw Mr. Thomson, Mr. Meagher, and Mr. Jones. *L. R., 11 Eq., 10; L. R., 5 Eq., 376; 13 U. C. C. P., 611; L. R., 10 Ch. Ap., 343; Ib., 431; 3 M. & G., 359.* Mr. Kinnear might naturally wish to make extraordinary provision for the wife and his infant children, particularly in view of the fact that he had just bought an establishment for them which it would be costly to keep up. (WEATHERBE, J.—When he first deposited the money, he found he could not deposit it in his own name, and so put it there in the name of the children; afterwards he entered it on their account. Then you have the evidence that he would not touch the children's money. Are you not bound to go back and find his intention at the time he deposited it?) If he gave the children the legal title to the money the only question is whether he intended to reserve a trust for himself. The question is gift or no gift, and that is a question of intention, not necessarily at the first, but if we could establish by evidence at any time that he gave it to them at any time. He did so clearly, and according

to the wife's evidence, he said from time to time, as he deposited money there, that he had put more money in the Savings' Bank for Beatrice and Dora. On the point that they cannot be allowed to set up an answer that the testator violated the law, *15 Ves.*, 68. It would be a fraud to induce even a private banker to take money at 5 per cent. that he would not take at more than 4 if he knew that the depositor intended the deposit for himself. (WEATHERBE, J.—Had they authority to make the regulation?) He was informed that there were regulations, and he intended to violate them. He cannot be heard to say that he was intending to evade the law. *3 K. & J.*, 310. The codicil made subsequent to the conversation with Mrs. Kinnear is important. He first makes provision for the protection of these children's interest by appointing guardians for them.

Ritckie, Q. C., contra.—The entries in Mr. Kinnear's own book are important. The entries are of his own stocks held by him. Yet among them he includes these sums invested in the names of Emily and Theodora. (MCDONALD, J.—How could that book, kept under Kinnear's directions, be evidence against the residuary legatee?) It is evidence of his intention at the time of making the deposit. If the money had been invested for his children it would be kept apart from his own altogether. No importance can be attached to the use of the words "on account of Beatrice Kinnear" or "Theodora Kinnear," because the same amounts are entered "in the name of," &c. These entries and the whole transaction are perfectly consistent with the intention to deposit this money for himself, using the names of his wife and children, to comply with the requirements of the law, which prevented him from depositing more than \$1,000 in his own name. Assuming that this was for the daughters, it is an advancement. (*Attorney-General*.—That point does not come up here. There is nothing about it in the judgment or in the grounds of appeal.) It is not in the judgment, because the case was decided in our favor on another ground. (*Attorney-General*.—The question of advancement was never raised by the answer. The answer claims that the money should go into the residuary estate. If it was an advancement it comes to us, only that we must account for it. WEATHERBE, J.—Is

there any authority for a suit like this,—for a prayer like this for instructions?) It is one of the most common suits in equity. (WEATHERBE, J.—If this is a good bill, what necessity was there for the act?) There was no necessity for it, except to provide a summary procedure. The Court in this case can settle how this money is to be distributed. (WEATHERBE, J.—What have we to do except to say whether the Equity Judge was right or not, and to confirm or set aside his decision?)

Thomson, Q. C.—The nature of this suit is misapprehended. The executors come in with a friendly application for instructions. They state all the facts necessary to enable the Court to instruct them. They are bound to state all the facts relating to their view of the case. (WEATHERBE, J.—They were not bound to state negative facts. They were not bound to state that it was not an advancement. If they had offered evidence that it was not an advancement it could have been objected to.) The evidence is here to shew that it was a gift, assuming the adverse construction of the evidence to be correct. We say that these facts warrant the necessary legal inference that it was an advancement.

Attorney-General.—If it is an advancement it cannot go into the residue, as they claim. There would be all the difference in the world. The question is, in whom is the title to this money? Admitting that it is an advancement, the title is in my clients.

WEATHERBE, J.—What decree could we make if we held it an advancement, as you ask us to decide? We would give judgment against you on that very ground. We would sustain the appeal, because the Equity Judge says it belongs to the residue, while you contend that it was an advancement, and if so, belongs to the children.

Ritchie, Q. C., resumes.—The case in *L. R.*, 10 *Ch. App.*, 343, shews that this was an advancement. Where a parent or person in *loco parentis* makes a gift to the legatee between the will and the death, it is conclusively presumed to be an advancement, and it is not a matter of evidence at all. The intention cannot be shewn by parol. (*Attorney-General.*—The intention cannot be shewn by parol, but the circumstances

are all matters of evidence to shew whether it was an advancement or not.) *5 M. & C.*, 29; *15 Ves.*, 43; *2 Beav.*, 454; *33 Beav.*, 81, 574; *3 K. & J.*, 310; *32 Beav.*, 370; *2 Williams on Executors*, 1439. (WEATHERBE, J.—In the case of an advancement the father must part with all control. Here the father did not part with his control.) If he did not, then it goes back to the estate. It is argued that the fact of a second codicil being made, confirming the will, shews that this was not an advancement. *Williams on Executors*, p. 41, meets that contention. *3 M. & C.*, 359; *1 B. & P.*, 307. There is nothing in the fact of the codicil being made to confirm the will so as to prevent these gifts from operating as advancements. The naming of Mrs. Kinnear and Mr. Jones as guardians would not have any reference to this money. That would only extend to the personal guardianship. They could not touch this money.

Thomson, Q. C., (with *Ritchie, Q. C.*)—The first will is April 4th, 1878. In that he left \$80,000 to the wife, with reversionary interest in the children, with special trusts, to be separate from husbands, survivorships to one and remainder to other children, and other sums all carefully limited. On October 23rd he made a trust deed. In that he made provisions of similar carefulness as to \$104,000. In the codicil, October 28th, 1878, he struck out the \$80,000 to his wife, and decreased the sum to his children by \$20,000. This was a month before the first deposit, which was made December 2nd, 1878. The second trust deed was made January 2nd, 1879, four days before the transfer of these deposit receipts. The reasonable conclusion from the carefulness of these provisions is that Mr. Kinnear simply wished to get an investment for his money, and not to vest it in his children, as he would not, after such careful limitations as to the rest of the money, invest this with no limitation whatever. There is no illegality about the investment in this shape. There is nothing to show that the letter of instructions from Langton was ever shewn to Kinnear. All that Kinnear was told was that he must make the investment in this way if he wished to get more than \$1,000 in the bank. The whole of the changes effected by the codicil were made with a view of equalizing the shares of the children.

The deposits, if made for the children, would have the effect of making them unequal.

WEATHERBE, J.—Why did he deposit \$5,000 to the account of each of them when he could have accomplished the same object, according to your view, by depositing in one account? Why open two accounts unnecessarily?

Attorney-General, in reply.—The book to which Mr. Ritchie referred as containing only accounts of Mr. Kinnear's own investments, is not such. It contains accounts of Pacific Railway bonds, which were held as trustee. Mr. Sweet's memorandum is to the same effect, only more explicit. It is argued that it would be strange that he did not keep an account of interest. There is nothing to shew whether he did or not. His bookkeeper would do that. The case in *13 Beav.* did not decide any legal principle at all. All the Master of the Rolls decided was that the impression made on his mind was that it was not a trust. A verdict of a jury might as well be introduced here. The fact is significant that he directed Mr. Sweet to write the child's name on each of the books; it is of importance as showing intention. A fact of that kind is always of importance. (WEATHERBE, J.—The question is whether the evidence of the wife, of what took place just before the testator's death, is to be taken as evidence of the intention of the testator at the time of the deposit.) I think that is evidence of an admission by the testator of what was his intention at the time. The question of whether the legacy is adeemed is, in every one of the cases cited by *Williams* in the passage quoted by Mr. Ritchie, considered as a question of fact, depending on all the circumstances. The circumstances of the children are to be considered, whether they required advances or not. If they did there might be a presumption that this was intended to adeem the legacy. But there were no such circumstances here. *L. R.*, 7 *H. L.*, 728; 2 *R. & M.*, 270; 15 *Beav.*, 565. In all the cases cited the question arose whether the legacy was adeemed by gifts made between the date of the will and the codicil, and it was always treated as a question of fact to be determined from the circumstances of the case. *Revised Statutes*, chapter 82, section 15.

WEATHERBE, J., now, (December 18th, 1882,) delivered the judgment of the Court :—

We may, for the purposes of this argument, adopt the law as laid down by the learned Judge in Equity, whose judgment is appealed from. The statement of the facts, also, as set forth in his opinion, may be our guide in applying the law. Certain sums were deposited in the Government Savings' Bank, by Thomas C. Kinnear, since deceased, in his name, as trustee severally for his daughters. Afterwards that money was withdrawn and therewith was by him purchased stock issued by the Government of Canada, to represent which he caused certificates to be issued in his own name, as trustee severally for his said daughters. The pass-books furnished by the bank officers to Mr. Kinnear were handed by him to his bookkeeper who, under Mr. Kinnear's direction, wrote upon them the names of his daughters, Beatrice Kinnear on one, and Theodora C. Kinnear on the other. He also invested money in the name of his wife in the same way. On first depositing these moneys in the Savings' Bank he showed his wife, the mother of these children, the certificates in the name of herself and her children, and spoke of it from time to time to her; he kept her constantly informed about his investments and his money affairs. He told her on occasions subsequent to the deposit of the first sum, that he had put so much more in the Savings' Bank for Beatrice or for Dora, the daughters; and on one occasion, shortly before his death, when about purchasing a house, which he said was to be his wife's, he had a conversation about the money he intended appropriating for it, and about a mortgage representing his wife's money then covering that property, which he said he intended to release and pay the balance out of money in the Savings' Bank. This is the evidence of Mrs. Kinnear:—"I asked him if it was my money, when he said no, he did not intend to touch my money or the children's, but to release the mortgage and pay for it out of his own money in the Savings' Bank. The investment of this money alone in the name of Mr. Kinnear, as trustee for his children, will, in law, be presumed to be an advancement for them, and, as the learned Judge remarks, it will be for those who seek to divert that money from this purpose to

rebut that presumption and show a contrary intention on the part of the parent.

The following evidence is relied on to rebut the presumption to be drawn from the investment made in the name of the children :—

1. That on a visit to the bank, before investing there, deceased made enquiries respecting the rules, and said he had moneys coming in and could get no better investment, when he was told that \$1000 was all that he could invest at 5 per cent., and \$10,000 at 4 per cent., in one name.

2. That before depositing in the name of the daughters, the investment in his own name had reached the limit mentioned, and he found, upon enquiring, that he would have full control of money invested by him, as trustee.

3. That in entering these sums in the book he added them all together, and passed the interest to his own account and opened no account for his daughters.

4. That he had already invested money in trust for these daughters in a more formal way.

5. That a codicil to his will, executed after this investment of the money in question, makes no mention of it.

The learned Judge below, in considering these circumstances, seems to think they are sufficient to rebut the legal presumption which makes the investment one for the daughters, and he says :—"There is a sentence in Mrs. Kinnear's evidence which might seem to lead to a different construction from this at which I have arrived. She says that on several occasions her husband told her that he had put so much more money in the Savings' Bank for Beatrice or for Dora, but I cannot lay much stress on this. * * * It is not to be supposed that the very words used by Mr. Kinnear would be remembered by her. If, therefore, he had used the expression, 'I have just put so much more money in the Savings' Bank in the name of Beatrice or Dora,' it would be consistent with all the other evidence." The learned Judge does not discredit any of the evidence. He arrives at his decision by attempting to reconcile the evidence of Mrs. Kinnear with the construction put by him on circumstances equally open, we think, to

another construction, and he treats the passage he has quoted as if, in its obvious sense, it were irreconcilable with the other evidence. It will not be denied that entire harmony exists between Mrs. Kinnear's distinct language quoted by the learned Judge, and the other evidence in the case. But the strongest statement in Mrs. Kinnear's evidence is not mentioned in the judgment appealed from. In speaking of these deposits or investments, deceased makes a clear distinction between his own money and that of his wife and his children. He says, "I do not intend to touch your money or the children's, but to pay out of my own." This language can be reconciled only with the presumption which the law requires us to adopt in favor of these children, and no explanation has been offered by which that language can be treated in any other way, except by rejecting the testimony of Emily Kinnear, the mother. Even without her evidence, (and I must avow the greatest respect for the learned Judge who delivered the judgment appealed from,) even without the evidence of Mrs. Kinnear it is not altogether certain to me that the legal presumption is rebutted. And I think her whole evidence is not inconsistent with all the proved acts or words of her late husband. The learned Judge below proceeded upon the plan of reconciling the evidence. It is because he does not impeach any of it, and did not succeed in reconciling it, that I cannot agree with the view he takes of the case.

I have carefully considered every circumstance relied on to rebut the presumption of law in favor of respondent. The statement of deceased that he had moneys coming in and could get no better investment, does not conflict with an intention, which is the legal presumption here, to invest a portion of that for his children. Nor does the fact that he exhausted the privilege of investing, in his own name, before depositing anything for his daughters; nor does his enquiry, before making such last-mentioned deposit, to ascertain whether he would have full control, in the Savings' Bank, of money invested by him as trustee; nor does the adding of all the sums together in his books, nor does the absence of mention of money in the Savings' Bank in the codicil to his will, made after the date of the investments; nor, considering that

these sums were entered in books which he severally caused to be marked by the names of his daughters, does the absence of their names in his book account. I cannot say that the fact in evidence that deceased passed the interest of the sums in question to his own account, is not the strongest one urged to rebut the presumption ; but, considering these children were of tender age, and provided for wholly by deceased in his family, perhaps that circumstance is denuded of much of its importance, and I think no legal presumption is to be drawn from the fact of the entry of interest. And it may be remembered that the learned Judge below seems to support the inference drawn by him from the entry of the interest to deceased's own account by the argument, that so correct a man of business as Mr. Kinnear would have opened an account and placed the amount of the interest to the credit of his children. A remark of this kind in the judgment of a Court before whom the witnesses appeared, would, in many cases, carry peculiar weight ; but the evidence in this case, all taken before a master, was read before the learned Judge in Equity as it was before us, and the books of account produced there were brought here. And I, having examined them carefully, may perhaps, take occasion to remark, that the entry of moneys received and invested and paid, seemed to have been made without any attempt at systematic bookkeeping which, in this instance, could not, perhaps, be expected.

In conclusion, we are of opinion that the money in question invested by the late Thomas C. Kinnear, in his own name, on trust severally for his two daughters, Beatrice Kinnear and Theodora Clifford Kinnear, was so invested in trust for his said daughters respectively, and that the same belongs to them and cannot now form part of his estate. We think, therefore, that the appeal must be allowed, and that the costs of the several parties before the Equity Judge, and on the appeal, should be paid out of the estate

MCKINNON v. MCNEILL ET AL.

Before SMITH, JAMES, and WEATHERBE, J J.

*(Decided December 18th, 1882.)**General verdict for plaintiff.—One of the issues found for defendant.*

THE jury found a general verdict for plaintiff ; but, in answer to a question put to them by the Judge, found one of the issues raised by the pleadings for the defendant.

Held, that the general verdict for plaintiff must be set aside.

Per JAMES, J., that it could be amended.

This was an action for trespass to personal property. Plaintiff's declaration contained the following counts, among others :—

That the plaintiff intended building a ship or vessel at Christmas Island, and erected a platform stage and wharf there of logs and timber, on which the same was to be constructed, and made all necessary preparations for proceeding with his work of ship-building, and the defendants cast adrift or broke up, destroyed or injured the plaintiff's platform stage and wharf, and deprived the plaintiff of the use thereof, whereby he was delayed and prevented from building his ship, and hindered from prosecuting his work in connection therewith, and by reason thereof has sustained damages ;

That the defendants, on divers days and times, broke and entered certain land of the plaintiff, covered with water, situate on the point adjoining the glebe lands, near Christmas Island, and destroyed and deprived the plaintiff of the use of a platform stage and wharf erected thereon ;

That the plaintiff, on the shore of the Bras d'Or Lake, near Christmas Island, in said County, and between high and low water mark, built a platform stage and wharf, and the defendants broke and entered thereon, and destroyed the said platform stage and wharf ;

Defendants, for a fourth plea to said first count, said that at the time of the alleged taking away and seizing, the land upon which the said sixty wharf logs and one hundred and sixty logs were put or placed, was the freehold of the Church of Saint Barra, of the Roman Catholic Corporation of the Diocese of Arichat ; and the defendants as the servants, and by the command of the said Corporation of the Diocese

of Arichat, because the said wharf logs and logs were then wrongfully in and upon the said messuage encumbering the same, and doing damage there to the said corporation, did, by the command, and as the servants of the said corporation, the owners of the said freehold, remove the said logs from the said land ;

And for an eighth plea to said second count, the defendants said that at the time of the alleged seizing, carrying away, and casting adrift, the Church of Saint Barra at Christmas Island, of the Roman Catholic Corporation of the Diocese of Arichat, was lawfully possessed of a certain messuage, and the said messuage was the freehold of the said Church of Saint Barra of the said Roman Catholic Corporation of the Diocese of Arichat, and the said platform stage and wharf were placed wrongfully on the freehold of the said Church of Saint Barra, to the damage and injury of the said freehold ; and they, the "defendants, as the servants, and by the command of the said Corporation of the Diocese of Arichat, because the said platform stage and wharf were then wrongfully in and upon the messuage, encumbering the same, and doing damage thereto the said corporation, did, by the command, and as the servants of the said freehold, remove the said platform stage and wharf from the said land, which are the alleged trespasses."

At the trial of the cause before JAMES, J., the learned Judge submitted the following questions to the jury :—

1. Had the Church authorities exclusive and continual use and possession of this Point for twenty years before action was brought ?
2. Did the plaintiff's platform rest on the shore at any point above low water mark ?
3. Did defendants remove any of the plaintiff's logs or timber that were in or over the water, and not resting on the lands above medium high tides ?
4. What was the value of the logs and timber so removed ?

To the first and third questions the jury returned affirmative answers. To the second question they replied, "None except the plank." To the fourth question they replied fixing the value of the property removed at \$125.60. The jury found a general verdict in the plaintiff's favor for \$152.

A rule was taken to set the verdict aside, as against law and evidence, for the improper reception and rejection of evidence, for misdirection, and on the grounds following:—

That the jury having found the land in dispute was possessed by the Corporation of the Diocese of Arichat, or the Church of Saint Barra, the defendants, as their agents, were justified in committing the trespass complained of.

That the alleged trespasses were committed after notice to the plaintiff to refrain from erecting the structure on the lands of the corporation for whom the defendants were acting, and were only such as were sufficient to prevent the erection of the said structure on the lands of the said Roman Catholic Corporation of the Diocese of Arichat.

That the plaintiff erected a nuisance on the borders of the lands of the Church of St. Barra, or of the Corporation of the Diocese of Arichat, and the defendants, at the instance of the owners and occupiers of the same, removed said nuisance, as they lawfully might, which were the alleged trespasses.

The rule was argued December 20th, 1881.

Attorney-General, in support of rule.—The verdict must be set aside, because it is a general one, and, according to the jury's finding, there was no trespass to the plaintiff's real estate. The first question put to the jury was, whether the Church authorities had exclusive possession of the point before the time the structure was erected for twenty years before action was brought, and in reply they answered yes. (SMITH, J.—Is there anything to show that any portion of the structure was upon that property?) There is a conflict of evidence on that point. I contend that there is a preponderance of evidence that way. I hold, however, that even if it were not on the property, but was merely placed in front of it so as to obstruct access to the water, it was a nuisance which we would have a right to remove.

The Attorney-General was stopped and *Meagher, Q. C.*, was called upon contra.—The fourth plea is not a sufficient answer to the first count. (WEATHERBE, J.—If there were a hundred pleas of justification they have not made them out.) There is no plea denying the possession of the point in the plaintiff. The possession of the plaintiff must be specifically denied,

Churchwardens v. Vaughan, 2 R & C., 438. (WEATHERBE, J.—Our statute in reference to a specific denial is a copy of the English statute, and there are eight or ten English cases holding that a plea in the terms of the plea here is a specific denial of possession in compliance with the terms of the statute.) (SMITH, J.—I must be bound by the decision in *Churchwardens v. Vaughan*.) *Grotto v. Farish*, Thom. 291, 6 Exch., 119. On the authority of *Churchwardens v. Vaughan* it is not open to defendants to open up the question of title to this land. Nuisance is not pleaded, yet at the trial it was sought to justify by adducing evidence that the wharf was a nuisance; neither is there any plea that no more damage was done than was necessary, which might have called for a reply. In view of the absence of such a plea no reply was necessary. This question was not raised at the trial. There is no denial of property as to the third or fourth count. *Practice Act*, section 146. There is a plea of possession, but as against that we have proved that we were in possession. To the fourth count there is no denial of the trespasses alleged. Plaintiff obtained his deed on the 15th August, 1877, and was on the property several times in the exercise of his rights. (SMITH, J.—Did he not ask permission to place the wharf there?) No, he wished to erect it near the public wharf on the glebe property. The damages are not for breaking and entering, but for the trespass to the personal property; because the ends of the platform rested on their land, what right had they to set the timber adrift. (WEATHERBE, J.—None whatever. That was conceded.) They could not have had possession of the point. There was no clearing of it, or fencing. (WEATHERBE, J.—We may admit that there is none. The only difficulty is whether you can touch that part of the case at all.) No part of the wharf was above low water mark with the exception of two planks, which were used as a means of getting from the shore to the wharf; this is found by the jury. The terms of defendant's grant show they do not claim the property in dispute. There is no proof that defendants went there under the directions of any one but the clergyman residing in the Glebe House. In order to justify, there must be a command shown from the bishop.

Attorney-General in reply.—The contention with reference to the plea of not possessed will not avail. Assuming the decisions in *Churchwardens v. Vaughan*, and in *Grotto v. Farish* to be correct, they do not decide that the plaintiff would be entitled to recover under such circumstances as we have here. In the *Churchwardens v. Vaughan* we would have succeeded if we could have shown title, as we have here. We have shown twenty years possession. I am arguing now on the supposition that the wharf was partly on the land; we do not claim possession of the land covered with water. If the verdict was a general one it should be set aside, because it is clear that plaintiff must fail in regard to trespass to the realty. If the verdict was special for trespass to personalty, as I view it, it should be set aside as being against the weight of evidence. The case was treated all through as if the plea of not possessed was on the record, and the defendants cannot now avail themselves of its absence. It was proved that the clergyman was acting for the corporation, and was their agent. As regards the question of excess, where the plea alleges that the timber set adrift was encroaching on property of the defendant, it is clear that the plaintiff must now assign, 7 *M. & G.*, 316. In regard to our right of access to the water. See 2 *Waterman on Trespass*, 167; *Angell on Tidewaters*, 115. (*Meagher, Q. C.*—That was not pleaded.) It was tried and submitted to the jury who were charged upon it. 8 *Q. B.*, 873; 15 *Q. B.*, 276. (WEATHERBE, J.—Mr. Meagher says some of the counts are not denied.) In reference to the third count it alleges no cause of action at all. The fourth count makes no allegation that the stage was on the plaintiffs' land, or was his, or that he had any right to the use of it. The eighth plea, however, is pleaded to that count. In the fifth count there is no sufficient allegation of property, and no damage is shown or given; the eighth plea is pleaded to that count. The other two counts are for trespass to the realty to which we answer not guilty, and *liberum tenementum*.

SMITH, J., now, (December 18th, 1882,) delivered judgment:—

The plaintiff in this case has, by the evidence, shown his right to recover the damages for which the verdict was given

and there is no doubt there are counts to be found in the declaration to cover this finding for the trespass to the wharf or platform; but, by the sixth count, the plaintiff claims for a trespass to land of the plaintiff, therein described, and damage to his personal property. The jury have, by a special finding, distinctly negatived this allegation respecting the land, and have found said land to belong to those under whom defendants, in their pleas, justify; and, therefore, we cannot see, under the finding of the jury and the evidence, why the defendants should not be entitled to a verdict on this count. For this reason there ought to be a new trial.

WEATHERBE, J.—I think, after looking over the whole evidence, and the special finding of the jury with regard to trespass and the value of the property, that there is enough to establish the verdict. I need say nothing about the seventh count, which does not allege the real estate to belong to any one; but the sixth count is good. Under the seventh count, however, there is a plea of justification, and there is a finding of the jury upon it which is clearly in favor of the defendants. No authority was produced to show that this general verdict could be entered up, and I do not see how the verdict can stand, unless it is agreed that there shall be a verdict for the plaintiff on the sixth count.

JAMES, J.—There were two valid issues; one for trespass to personal property—the verdict for the plaintiff, on which is not impugned by the opinion of my learned brethren—the other for trespass to real estate. The latter was found, in answer to an express question put by the Court in favor of defendants, viz., that the parties under whom they acted had “continual use and possession” of the locus for twenty years before action brought. Undoubtedly, this question being answered in their favor, the defendants had a right to have a verdict entered in their favor on this issue. But this is a remedy which this Court can give them by amendment, under the authority of *Revised Statutes*, chap. 94, sec. 101, which enacts that “the Supreme Court, and any Judge thereof, shall at all times have the power of amending all defects and errors in any proceedings in civil causes, whether

there be anything in writing to amend by or not, and whether the defect or error be that of the party or not." This enactment does not appear to me to be at all difficult to understand, or easy to misconstrue, and it has been acted upon both in this Court and in the English Courts; in our own Court in *Boutilier v. Knock*, and other cases, and in England especially in *Parsons v. Alexander*, 5 E. & B., 262, where the Court ordered an amendment to be made in favor of a defendant to whom it had been offered at the trial and refused by him; and the Court directed that it should be expressed in the rule that the Court made the amendment of its own motion. This case has never been overruled, nor, so far as I know, questioned. Under the authority of these cases I think that instead of sending the cause back for a new trial, the Court should direct a verdict to be entered for defendants on the issue for trespass to real estate. This will do full justice to all parties without the great and unnecessary expense of a new trial—the proposed amendment being to correct a mere informality in not entering the verdict for defendants on the one issue.

CURRY v. LECRAS.

Before McDONALD, SMITH, and WEATHERBE, JJ.

(Decided December 18th, 1882.)

Appeal from Justice of Peace.—Affidavit.

THE affidavit for appeal from a Justice of the Peace, in civil cases, must be made before the Justice who tried the cause.

This was an appeal from a decision of the County Court Judge for District No. 7, who submitted a case for the opinion of the Court, under chapter 2 of the Acts of 1880, section 107. Defendant had appealed to the County Court from a decision of a Justice of the Peace, and a rule absolute had been granted by the County Court Judge, quashing the appeal, on the ground that the affidavit upon which it was taken was made before another Justice of the Peace than the one before whom the trial and proceedings took place, and who gave

judgment in the matter. The case submitted to the Court raised the question as to the regularity of the appeal on the affidavit so made.

The appeal was argued March 18th, 1883, by J. J. Ritchie, in support of the appeal, and Tupper *contra*.

MCDONALD, J., (December 18th, 1881,) was absent on account of illness, but the following opinion, prepared by him, was read by Mr. Justice SMITH :—

This suit was commenced before M. J. Phoran, a Justice of the Peace, residing at North Sydney, from whose decision, after trial, the defendant sought to appeal to the County Court. For that purpose he undertook to make the affidavit required by section 31, chapter 91, *Revised Statutes*, before another Justice of the Peace, not concerned in the cause, but residing at the same place. In the County Court a rule *nisi* to quash the appeal was granted, and afterwards made absolute on the ground that the affidavit should be made before the justice who tried the cause, and no other; and the case is now before us under chapter 2, section 107, Acts of 1880, for the judgment of this Court. Section 31, chapter 91, *Revised Statutes*, just referred to, provides that, "in case of an appeal, the appellant or his agent, before the appeal shall be allowed, shall make an affidavit, in writing, that he is dissatisfied with the judgment, and feels aggrieved thereby, and that such appeal is not prosecuted for the purpose of delay, and shall file the same with the justice; and the party appealing, or, in his absence, his agent, shall, within ten days after the judgment, enter into a bond with sufficient surety, in a penalty double the amount of the judgment, with a condition that the appellant shall prosecute the appeal, and perform the judgment of the Court, or render the body of the appellant, and pay the costs accruing on the appeal; or shall before the first day of the term of such Court pay the amount of the judgment, together with all costs subsequently accruing, and such justice, or, if the action be before two justices, then the first one applied to therein, if thereto required, shall prepare the affidavit and appeal bond," &c. I am of opinion that the words *such justice*, as they are used in this section, refer to the justice previously mentioned as the one with whom the affidavit is to be filed,

and no other ; and, as it cannot be contended that it could be legally filed with a justice different from the one who tried the cause, the latter must be the one contemplated by the section. It is clear that, under its wording, the justice who is to prepare the bond is the one to prepare the affidavit also ; and, turning to chapter 114, *Revised Statutes*, " Of costs and fees," we find that, in taxing the costs in the cause payable to the justice who has the matter in hand, he is allowed, with other charges to which he alone would be entitled by the statute, fifty cents for the appeal bond, and ten cents for " the affidavit on appeal and swearing," while there is no provision to pay any other justice for such work. But it is said that, by the terms of the section, the justice is to prepare the affidavit only if required so to do ; and no doubt that is quite true, but there is no authority given to another to take his place, even if required. I think the legislature intended, by that provision, simply to impose upon the justice who tries a cause an obligation to prepare the affidavit and administer the oath, which if he refuses to fulfil upon being required, renders him amenable to law and gives the appellant a right not otherwise provided. There is no such obligation thrown upon any other justice than the one who tries the cause, nor is there any provision for remunerating any other for that work.

On referring to the same chapter it will be seen that the words " the justice " and " such justice or justices " are used, the same as here, in a number of cases in which it cannot be pretended that any but the justice who issues the summons and tries the cause could have been intended. Section 14, chapter 1, *Revised Statutes*, provides that " justices of the peace may administer all oaths with regard to the taking of which no particular directions are given ; " and we are asked to come to the conclusion that, under that section, any justice of the peace could legally administer the oath in question. I do not think that we can do so, because, as I read the act, there are in this case directions given, sufficiently particular—much more particular than in many cases arising in the Supreme Court under our statutes, and in which cases affidavits become necessary, without the acts prescribing any particular directions as to the manner of making them, but in which it cannot be reasonably contended that the oath

could be legally administered by a justice of the peace. I think the object of that provision is very different from that contended for by the defendant. The legislature thought proper, in prescribing the form of the affidavit in question, (*Revised Statutes*, p. 424,) to entitle it, "In the ——— Court, before (*name the justice or justices before whom the trial was had,*)

Between } A. B., plaintiff,
 and
 C. D., defendant."

If the tribunal be a court, as the legislature assumed it to be, it can only be a court before the justice named in the writ of summons as the one before whom alone the defendant was to appear and answer to the plaintiff, and who alone had the power to adjudicate in the particular case; not as in the higher courts,—for instance, the Supreme Court, in which all the Judges have concurrent and equal powers in all cases that may be brought into that Court, and in which it is not necessary or proper to name any particular Judge in entitling any proceedings, in order to render the same valid. It appears to me that an affidavit of this kind, sworn to elsewhere or otherwise than as directed in the statutory form,—that is "in the Court before," "the justices who tried the cause" would be bad. We have no copy of the affidavit in question, but must assume that it is in the form given by the statute. If not, our attention should, and, I have no doubt would, have been called to that fact at the argument, and if it *is* in that form, we have the uncontradicted affidavit of Mr. Hearn that it was not sworn to, as it purports to be, in the Court before Mr. Justice Phoran. In any case the statutory form referred to in the act is very important to shew that the affidavit should be not only prepared by, but sworn to in the Court before, the justice who tried the cause,—namely, Mr. Justice Phoran.

I am therefore of opinion that this appeal must be dismissed, with costs.

WEATHERBE, J.—However convenient it might seem to be, where an appeal is required from a decision of a justice of the peace, to swear the affidavit upon which it is to be granted before another justice, I cannot see, after carefully examining

the statute, though I at first had doubts, that the legislature intended to give power to a justice who had nothing to do with the case to swear the affidavit. Practically, where the party aggrieved is absent in the same or another county, and unable, from illness or other cause, to attend, and the agent cannot make the affidavit, there is no appeal. Yet, I think, no other construction can be sustained by the rules of law.

SMITH, J., concurred.

LAWLOR v. MUMFORD.

Before McDONALD, C. J., and RIGBY, and THOMPSON, J. J.

(Decided December 23rd, 1882.)

Goods sold to be delivered in a "satisfactory condition."

PLAINTIFF contracted to deliver to defendant a mowing machine, to be delivered in a satisfactory working condition, and brought the machine to defendant's field where, in the course of a trial which he proceeded to make, a wheel became broken, which plaintiff promised to replace. Five witnesses swore that the wheel was a material part of the machine, and there was some evidence that it was not.

Held, that plaintiff could not recover the price, as the machine was never delivered in a satisfactory working condition.

Plaintiff sued defendant for the price of a mowing machine. The contract, as sworn to by plaintiff, was that he was to deliver a first-class machine, in a satisfactory working condition. The machine was taken to defendant's ground by plaintiff, who proceeded to make a trial of it, and, in the course of the trial one of the wheels was broken. Plaintiff agreed to replace this wheel, but did not do so. Defendant returned the machine, and plaintiff refused to accept it. The action was brought originally in the Municipal Civil Court of Dartmouth, where the judgment was in favor of plaintiff. Defendant appealed to the County Court, where the judgment of the Municipal Court was affirmed by JOHNSTONE, J. Defendant again appealed to the Supreme Court, on the grounds set out in the following rule:—

On reading the minutes of evidence, and the pleadings herein, and my judgment in this cause, and defendants having filed security in a bond to my satisfaction, and of which I

hereby approve, I do order that the defendants have leave to appeal from my judgment herein for the plaintiff to the Supreme Court of Nova Scotia, and to have the judgment for the plaintiff in this cause set aside, on the following grounds :—

1. Because the same is against law and evidence.

2. Because the plaintiff's contract, as sworn to by himself, was to deliver the machine, for the price of which this action was brought, in a satisfactory working condition, and the same was never delivered in a satisfactory working condition.

3. Because the plaintiff undertook to deliver said machine and to put the same in good and satisfactory working condition, and plaintiff's said undertaking and contract was one and indivisible, and no action could be brought on said contract by plaintiff until said machine was by him put in good and satisfactory working condition, and said machine was never put by plaintiff in said condition.

4. Because in attempting to put said machine in good and satisfactory working condition, as required by his contract, plaintiff broke one of the main wheels, being an essential part of said machine, and the plaintiff never replaced the same, although said plaintiff was not in any way prevented by defendants from doing so, nor was the replacing of said wheel ever dispensed with by defendants, and the replacing of said wheel, and otherwise putting said machine in a good and satisfactory working condition, was an essential part of plaintiff's contract, and a condition precedent to his recovering the price or any part of the price or value of said machine.

Russell, for appellant, cites *Pollock on Contracts*, p. 464 ; *Addison*, p. 510 ; *Murphy v. Romo*, 2 R. & G., 175.

Sedgwick, Q. C., contra.

THOMPSON, J., now (December 23rd, 1882,) delivered judgment :—

There was a bargain in this case, between the plaintiff and defendant, for the purchase, by the latter from the former, of a chattel, which the plaintiff agreed to deliver in satisfactory condition. The plaintiff admits that the chattel was delivered in a broken condition. He took it to the defendant's premises

and proceeded to make a trial of it. While it was undergoing that trial the plaintiff broke it, or it was broken in such a way that it would require a new wheel. The chattel can hardly be said to have been delivered while in the plaintiff's possession under trial, and in the absence of delivery he cannot sustain his action. There was some evidence that the defect was not material, but the plaintiff admitted that it was when he agreed to provide a new wheel. Five witnesses, on the other hand, agreed that the defect was material.

RIGBY, J.—I concur in the judgment delivered. The only contract was to deliver a machine in satisfactory working condition. I do not think it was enough that the machine would cut grass. The contract was to deliver a machine complete in every respect, and I do not find that there was any evidence of a delivery according to contract. It was taken to the field for trial, and was there incomplete. This was admitted by the vendor. Both parties were engaged in an attempt to repair it when a wheel was broken. The plaintiff admitted that in order to complete the machine it was necessary to replace the wheel. He replaced it temporarily, and engaged to get a new wheel manufactured. He never gave the defendant this new wheel, and he has given no sufficient excuse for his failure to do so. For these reasons I think the judgment for plaintiff must be set aside.

MCDONALD, C. J., dissented.

WOOD v. SMITH.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided December 18th, 1882.)

Ejectment.

Verdict for defendant in ejectment upheld where there was no evidence to identify the land in plaintiffs' deed with that in dispute.

This was an action of ejectment, tried before DESBARRES, J., at Amherst, October 12th, 1880. The learned Judge charged the jury as follows:—

I told the jury that the plaintiff had brought this suit to recover from the defendant the possession of the land described in his writ, which, he alleged, was included in a grant from the Crown to one Arthur Marsters, dated 6th November, 1857, then conveyed by Marsters to Messrs. Daniel & Boyd, 28th January, 1860, and by them conveyed to him, the plaintiff, 11th November, 1874. The defendant, by his plea, defended for a part only of the premises set out in plaintiff's writ, and disclaimed all right to the residue of said premises. The defence set up by defendant in this suit was a title in himself to that part of the land described in his plea as being derived through several conveyances, beginning with a deed from William Ibbitson to Thomas Ibbitson and James Brown Ibbitson, dated 9th January, 1832, then a mortgage from them to the Honorable and now Sir Charles Tupper, dated 18th August, 1868; next an assignment of that mortgage by said Tupper to William M. Fullerton, dated 16th August, 1870; then a deed from Roderick McLean, Sheriff, to William M. Fullerton, dated 20th December, 1875, and ending with a deed from William M. Fullerton to the defendant, dated 1st July, 1878; that this being an action in which the plaintiff could only recover on proof of a legal title in himself to the land described in the writ, it was their duty carefully to consider the evidence adduced in support of his case, and if that evidence had satisfied their minds that he was the legal owner of the land he was entitled to their verdict. But if the plaintiff had failed to convince them that he was the legal owner of and entitled to the possession of the land, he could not recover, however defective the defendant's title might be, for, if he recovered at all, it must be on the strength of his own title, and not on the weakness of the title of the defendant, it being enough for the defendant to shew either a title in himself, or in some person other than the plaintiff, to entitle him to a verdict in his favor. I remarked that to entitle the plaintiff to recover it was incumbent upon him to prove that the land of which defendant was in possession, and for which this suit was defended, was within the boundaries set forth in his writ, and comprehended in the grant to Marsters, through whom he claimed. These boundaries ought either to have been proved by persons acquainted with or by the surveyor

who made them, but the plaintiff had not attempted to give any evidence of the lines and boundaries of the land granted to Marsters, or any evidence to shew that the land in dispute was within and part of Marsters' grant. He had been content to give in evidence a certified copy of the grant from the Crown to Marsters, and the deed of conveyance passing between Marsters and others to himself, and left them (the jury) to find out from these documents, as best they could, whether the piece of land in dispute was included in Marsters' grant or not. A fact so essential and necessary to the support of the plaintiff's case ought certainly to have been proved by him before he could call upon or expect a jury to find a verdict in his favor. If any weight was to be given to the testimony of the witnesses on the part of the defendant, it would, I thought, be difficult to come to the conclusion that the land in dispute formed any part of the Marsters grant. Their testimony would rather lead to and warrant the conclusion that the piece of land in dispute was part of what was called the Ibbitson land, of which Thomas Ibbitson and James Brown Ibbitson, through whom the defendant claimed, had held possession for upwards of thirty years. If they took that view in considering the evidence, they would, in that case, have to decide whether this piece of land still remained the property of the Ibbitsons, or had passed from them by their mortgage to Sir Charles Tupper and was now the property of the defendant. I read over the whole of the evidence from my minutes to the jury, drawing their attention, while doing so, to what seemed to me the most important parts of it, and telling them, in conclusion, to exercise their own judgment as to its effect, and find a verdict in accordance with the impression the whole of the evidence had made on their minds.

The jury returned a verdict for defendant, and the cause now came up on a rule to set the same aside.

Graham, Q. C., in support of the rule.—The learned Judge should have received the Ibbitson grant, and should have allowed the plaintiff to locate the deed from Ibbitson to Marsters. The defendants have not proved any title, and no deed that they have put in includes the *locus* further back.

than the deed from Fullerton to defendant. There is no possession of the whole lot for which they defend proved. There is possession of thirty-three acres, marked cleared on the plan, as far back as 1847, but there is no deed that will draw with it the possession of the whole. The Marsters grant, covering the *locus* and also the cleared portion, passed November 6th, 1857, at which time there was not twenty years' possession against the Crown, and it was therefore competent to the Crown to grant. In reply, plaintiff put in a recovery in ejectment by Daniel & Boyd, claiming under a deed from Marsters, against Thomas Ibbitson, who was in possession of the cleared lot. Sufficient importance was not attached to this, and it was not put to the jury. Under this recovery we were entitled to whatever title Ibbitson had, and his possession became ours. The Judge should have told the jury to find a verdict for plaintiff. The writ was issued 14th May, 1867; the grant to Marsters was issued November 6th, 1857; Marsters conveyed to Daniel & Boyd January 28th, 1860; Daniel & Boyd conveyed to plaintiff 11th November, 1874. The defendant's title is, deed William to Thomas and James Ibbitson, 7th January, 1842; mortgage by the latter 8th August, 1868; assignment to Fullerton, August 16th, 1870; sheriff's deed, December 20th, 1875; deed to defendant, July 1st, 1878. In rebuttal, the plaintiff put in the record of recovery in ejectment, *Daniel & Boyd v. Thomas Ibbitson*, 16th April, 1861.

Townshend, Q. C., and Meagher, Q. C., contra.—It is a matter of no consequence to the defendant whether he has title or not. The question is whether the plaintiff has title or not. We contend that he has no title. His title is based on the Marsters grant. There is no evidence where that is. It is not located. (WEATHERBE, J.—We know it is on the north side of the Goose River Road. The grant says so, and we know where the Goose River Road is.) Nothing more than that is known. It may be anywhere on the north side of the road. No starting-point was shewn. There is no proof that the land defended for is part of the Marsters grant, supposing the grant to have been located. The Judge was right in not admitting the Ibbitson grant. The plaintiff could

only succeed on his own title, and if that grant strengthened his title, he should have put it in at the outset, and not by way of rebuttal. (WEATHERBE, J.—The sole point is whether the plaintiff has made out a case or not. If he has, the verdict cannot stand, as you have failed as to a part of the land you defended for.) We were in possession for twenty-one years after the grant from the Crown, so that the plaintiff is out of Court on that ground. (WEATHERBE, J.—It is admitted that you have title to part, but it is claimed that the plaintiffs are entitled to the other part, and that the verdict, therefore, should not stand.) In reference to the recovery in ejectment, there is no evidence that the land recovered was identical with this. Assuming that there was an identity, the recovery has no effect unless possession was entered into under it. Fullerton brought ejectment and recovered against Ibbitson, who defended for the land in the Marsters grant. Under that recovery Ibbitson's possession became ours. *Fullerton v. Ibbitson*, 3 R. & C. The facts were all left to the jury and found in our favor.

Graham, Q. C., in reply.—(SMITH, J.—You may confine yourself to the question of identity. If you establish that you must succeed.) The question is whether there is any reasonable evidence of identity. It is like a question as to the identity of a man. *Taylor on Evidence*, vol. 2, p. 1544. This is not a case where you must go to every spruce tree. (WEATHERBE, J.—Certainly not. But you must make out a *prima facie* case.) We have shewn the road which is the main boundary. (WEATHERBE, J.—The road may be fifty miles long. You want to shew some point on the road.) We have evidence of these parties claiming a part of the land under the Ibbitson grant, which is to the south. We are entitled to the land in our writ, and the defendant admits that he is in possession of it. There is evidence that Ibbitson was in possession of land north of the road. The defendants have identified the part they claim, which is included in the land we claim. The land in dispute is located by Valentine Wood in his evidence. There could, I think, have been no reasonable doubt in the minds of the jury that the land was located. The record of recovery in ejectment was some

evidence to have been submitted to the jury. There is really no dispute here as to identity, and reasonable evidence is sufficient, without proving every boundary. The plaintiff begins by putting in deeds corresponding to the writ; and it is not necessary to shew the boundaries on the land unless the bounds are disputed. All plaintiff has to shew is that the land is in the county where *venue* is laid, to give jurisdiction. There is an admission here, on the record, that the land defended is within the bounds described in the writ. There was less evidence of identity in *Cunard v. Irvine*, already cited, than we have here.

SMITH, J., (December 18th, 1882,) delivered judgment, as follows:—

I think the Judge's charge to the jury was entirely correct, and in accordance with the evidence, as there was clearly not sufficient testimony to shew that the land defended for was within the bounds of the plaintiff's land,—and that the rule must be discharged with costs.

WEATHERBE, J.—Plaintiff claims in this action of ejectment against defendant for withholding the possession of certain lands described in the declaration. He seeks to establish his title by proving a grant from the Crown to one Marsters, with a plan annexed; a deed from said Marsters to Daniel & Boyd, and a deed from the latter to plaintiff. The description in the declaration, of the land claimed, is word for word the same as that in the two last above-mentioned conveyances. And this description precisely corresponds with that of the grant from the Crown, with this exception,—the description in the grant closes with these additional words, not in the other deeds or the declaration, 'which said lot is particularly marked and described in the annexed plan, as also in a plan of survey of the said lot made by Thomas Logan, Deputy Surveyor.' The plan is attached to the grant, and no reference is made to any plan in the other deed or the declaration. I think the plaintiff was liable to be nonsuited, and that there is nothing in the evidence to avail him in getting rid of the verdict here,—first, because he gave no evidence in any way identifying the land described with that in dispute between

the parties; and secondly, because, if that was not a fatal omission, as I have no doubt it was, there was no evidence to shew that the land in the declaration mentioned is the same as that in the grant and plan described and delineated.

Holding the view I do, it is unnecessary for me to further discuss the case.

JAMES, J., concurred.

ALMON v. BRITISH AMERICA ASSURANCE CO.

Before McDONALD, SMITH and WEATHERS, JJ.

(Decided December 18th, 1882.)

*Partial or Total Loss.—Arrival of Goods in specie at Port of Destination.—
General Verdict.*

In an action on a policy of insurance on potatoes, in which it was stipulated that they should be free from all average unless general, the plaintiff obtained a general verdict by consent. The potatoes arrived at the port of destination damaged by sea water and very rotten, and evidence was received that they were worthless, and would not re-pay the expenses of taking them out of the vessel, yet 684 bushels were taken out, and, deducting charges for duties, custom house broker and commission, yielded net proceeds amounting to \$220.80. It was not shewn whether the cost of picking and sorting, &c., exceeded this sum or not.

Held, that, in view of the general verdict by consent, the Court must assume that the jury had found that the potatoes were worthless, as this was the only question for the jury, but that such finding was against the weight of evidence, as there was nothing to shew that the net proceeds realized were not clear of all expenses, and the burden was on the plaintiff to shew that there were expenses that exceeded said proceeds.

This was an action upon a policy of insurance issued by the defendant company, upon the cargo of the schooner *H. L. Sangster*, at and from Halifax to Philadelphia. The policy contained a clause providing that certain articles mentioned, including roots and vegetables, and such goods as are esteemed perishable, should be free from all average, unless general or from stranding.

The cargo shipped, consisting of 3700 bushels of potatoes, was found, upon arrival, to be greatly damaged by sea water. After assorting the cargo, 210 bushels were taken out in a damaged condition, and the rest thrown overboard. The potatoes saved realized \$360, but the evidence was that they were not in a marketable state nor fit for household use. A

verdict was entered for plaintiff by consent, subject to a rule to set the same aside, with the understanding that everything that a jury could decide in the cause on the evidence was to be presumed to have been decided against the defendants.

Henry, Q. C., in support of rule.—The substantial question is, whether there was a total loss proved. My first point is that the goods were in specie. The pages of Arnould, which touch the subject, are 735, 736, 880, 894 and 903. See opinion of Lord ABINGER in *5 M. & W.*, 598, which is adopted by the authorities. Where the insurance is on cargo in bulk, there can be no total loss on a part. See also *7 Taunt.*, 154. That was a case of insurance on sugar. One fifty-fourth part of the cargo was saved in a saleable state, and it was held no total loss.

McCoy, Q. C., contra.—In every case where goods have been saved and sold, they have been saved and sold in a merchantable condition, and were sold for the purpose for which they were intended. While the expression "exist in specie" is still used, its meaning has been considerably modified. If the condition of the subject matter is entirely changed, so that it is unfit for the original purpose, the insured can recover. The Court cannot take judicial notice that a potato is a vegetable; *1 Parsons*, 627. We are entitled to recover under the suing and laboring clause, at all events, the sum of \$290, no ground being taken that the amount is excessive. *Cocking v. Fraser*, which held that the fish, even when rotten, existed in specie, was expressly dissented from in *Burnett v. Kensington*, 7 T. R., 22; *3 B. & P.*, 474; *Roux v. Salvador*, 3 Bing., N. C., 266. Since this case, the doctrine of arriving in specie has not governed the decision, but other considerations have affected the result. In *Roux v. Salvador* the hides in question were rotten throughout, and fit only for manure. (WEATHERBE, J.—If the potatoes, in this case, were in the same condition as the hides were in that, the case applies.) (*Henry, Q. C.*—I assent to that.) The jury found that the potatoes were rotten throughout, and not fit for human food. A notice of abandonment was not necessary. The cargo was totally lost for the purpose for which it was shipped. *Cocking v. Fraser* has been adopted in the United

States, but in England it has been considerably modified ; 9 B. & C., 411. In *Roux v. Salvador*, cited above, the question of notice of abandonment is discussed ; 9 C. B., 30 ; 2 *Phillips on Insurance*, 440 ; 6 *Exch.*, 263 and 267. We are entitled to recover under the suing and laboring clause ; 1 C. P., Div., 355 ; L. R., 5 C. B., 397 ; L. R., 1 C. P., 535. As to the tendency of recent decisions cites 2 *Parsons on Marine Insurance*, 98, 99.

Henry, Q. C., in reply.—The question really comes to the point whether the goods have arrived in specie at the port of destination. Cases of loss at intermediate ports are determined on different principles from cases of loss at the port of destination. *Roux v. Salvador* does not apply directly to this case, though there are some points of analogy. The enquiry is stricter as to a loss at the port of destination than as to a loss at an intermediate port ; 2 *Phillips*, 1767, 1768. Insurance against total loss excludes a claim for insurance for total loss where the goods remain in specie and are the sort of article they were when shipped. (WEATHERBE, J.—Would any reasonable man call them potatoes.) Yes. The reason why the underwriters insist upon defending cases of this description is that all articles included in the memorandum clause are liable to inherent decay, and it is not possible to distinguish damage from inherent decay from damage occasioned by sea water. Potatoes are perishable goods within the memorandum clause. 3 *Sumner's Circuit Reps.*, 220. No case has been cited where if any appreciable portion of a cargo remained at the port of destination there has been held to be a total loss. Nothing but a complete loss or change in the nature of the goods is sufficient ; 2 *Phillips*, 436, citing *Mason v. Scurry*. I am not relying on the case, as I think it has been modified, and the element of value must be considered to some extent, *Raleigh v. Janson*, 6 El. & Bl., 422, is a leading case, though not important in this connection. The test is not whether or not goods are merchantable, but whether they are saleable in their original character, for instance, as corn or potatoes. The whole evidence shows that the potatoes here were sold and account sales made of them as such. They were culled after the risk had terminated.

WEATHERBE, J., now, (December 18th, 1882,) delivered the judgment of the Court :—

This was insurance on a cargo of 5742 bushels of potatoes from Halifax to Philadelphia. Roots and vegetables and such goods as are esteemed perishable, are by the policy declared free from all average, unless general. The cargo arrived at the port of destination, damaged by sea water and very rotten. There was evidence read at the trial that they were not in a merchantable condition and unfit for market, and when they arrived, they were considered worthless, or nearly so, and would not repay the expense of taking them out of the vessel; that they were in a condition dangerous to the health of the town. Notwithstanding this, 684 bushels were picked out, and, deducting charges of custom house broker and commission, left as net proceeds, \$220.80. Those sold were not in a marketable state and not fit for household use, and brought much below the market price. The great bulk of the cargo was thrown overboard. The following is the account of sales :—

PHILADELPHIA, Dec. 20th, 1878.

Sales by Joseph Wilkins,

Pier 8½ N. Delaware Ave. & 225 N. Water Street.

Received

For account of whom it may concern.

Cargo potatoes, per sch. <i>H. L. Sangster</i> , sold			
by order of United States Surveyors,			
210 bushels at 60c.....	\$126	00	
474 " 50c.....	237	00	
			\$363 00
Charges.—Custom House duties.....	\$102	60	
" " broker charges	5	40	
Commission, 5c. per bushel	34	20	
			142 20
Net proceeds.....			\$220 80
E. & O. E.			

The market price was about 90 cents per bushel. The freight and duties on the cargo were \$700. If sold in good order the cargo would have yielded \$3,000 to \$3,500. By the

certificate of the Board of Survey of the Admiralty, 95 per cent. of the cargo was damaged, and the cost of assorting would be greater than the value of the few that might have been saved. It does not appear by the evidence what was the cost of assorting what was saved from the cargo. It was contended for defendants at the argument that this cargo, in bulk, being insured free from particular average, the underwriters were not liable, on the ground that the cargo, or part thereof, arrived at the port of destination in specie. Though there have been conflicting decisions, it is now the clearly settled law of England, that where a cargo, free from all average, unless general, arrives at an intermediate port damaged by the peril insured against, though existing in specie, the loss will be total if the damage is so great that the goods would be of no value on arrival. It was, no doubt, once the law, that if the goods could be forwarded in specie, though entirely valueless, the underwriter was discharged. This was settled by Lord MANSFIELD in the case of *Cocking v. Fraser*; but it seems better, in the language of *Arnould*, to consider this case as overruled, than to endeavor to support it on the facts, and he pronounces the language of Lord MANSFIELD as "undoubtedly opposed to the rule now understood to prevail." *2 Arnould on Insurance*, 1022.

I never have understood, says Lord ALVANLEY, in *Dyson v. Roncroft*, 3 Bos. & Pul., 474, "that the underwriters insure fish and other articles against no perils which do not end in a total annihilation of the commodity." The case was one where fruit had become putrid, and the government prohibited it being landed, and it was thrown into the sea. He says, "the commodity was annihilated by being thrown overboard." Had it not been so annihilated it would have been annihilated by putrefaction, and is it not as much lost to the insured by being thrown overboard as though the captain had waited till it arrived at complete putrefaction?" The law, as it was settled in *Cocking v. Fraser*, remains in the United States, and there also the law remains as laid down in *Roux v. Salvador*, before Lord ABINGER overruled the judgment of TINDAL, C. J., both with respect to memorandum articles at an intermediate port and the port of destination; but since this ceased to be the rule in England respecting the intermediate port there,

has been no decision there either way, on the question where memorandum articles arrive valueless, but in specie at the port of destination. In speaking of *Roux v. Salvador*, Parsons, (2 *Par. Ins.*, 98), says, "That such is the law of England at this time, if the goods are utterly valueless from the effect of sea damage at an intermediate port, we think is clear, but that the same rule would be held to apply if goods in this condition reached their port of destination, may not be so certain. We think that even this may be inferred from the late English authorities." And, in a note, the author says, "and drawing the best inference we can from the current of authority, we are led to the conclusion that were a case now to occur in England of memorandum articles arriving in specie, but valueless at their port of destination, the insurers would be held liable for a total loss." I think the same principle should be held to prevail in the case of the port of destination as that of the intermediate port, and, on that ground, as we are not, that I am aware of, concluded by any authority, the argument that because these potatoes were in part in specie, and for that reason the insurers are discharged, cannot prevail. It will be apparent, in this view, if the consignee, before employing hands to sort these potatoes, upon the production of the survey, had taken them down the river, as he did afterwards, and thrown them into the sea, though the commodity specifically remained, the underwriters would not be discharged. Are they to be discharged now solely by reason of the act of securing and selling what were sorted by picking. In the case of memorandum articles damaged at an intermediate port all the expenses at that port are to be added to the extra freight, and if this exceeds the value of the goods on arrival, the loss is total, if not partial, 2 *Parsons Ins.*, 101.

The question where the goods arrive at the port of destination I suppose is, are they of value? If valueless, the loss is total. If, in the case under consideration, the cost of picking and sorting, and any other expenses of a like kind, arising by reason of the sea damage, added to expenses of sale, exceeded or equalled the value, the loss, as I understand the question, would be total—otherwise, partial. The charges here, including duties, custom house broker and commission, deducted from the proceeds of the sale, leave a net balance of \$220.80.

Did that expense reach or exceed the sum of \$220.80? This is not disclosed. Is this not necessary to make apparent a total loss? If so, the burden of proof is on the plaintiff, and he has failed. One other phase of the subject calls for our deliberation. I think we are left in this position:—Considering the price obtained as the value of the potatoes rescued from the rotting mass, and assuming a balance, in the absence of evidence to the contrary, in excess of the expense of rescuing the potatoes saved, how can it be said all was lost? Nothing but this can be said, that there is evidence that the potatoes sold were worthless. The consignee swears “those sold were not in a marketable state nor fit for household use. I was ashamed to offer them for sale.”

This cause came on for trial before a jury. After the evidence was in the defendant consented to a verdict for plaintiff, upon the understanding that everything a jury could decide in the cause on the evidence was to be presumed to have been decided against the defendants, which, however, I understand to be the effect of a general verdict by consent, where no express understanding is mentioned. If there was anything at all for a jury in this case, it was but this one question; were these potatoes sold at 60 cents and 50 cents per bushel, in fact of value, or were they worthless? We must assume they were found to be worthless, and, as far as a jury could determine, that the loss was total. But I am of opinion that the verdict is against the evidence. I think we cannot permit the assertion of opinion of the broker as to the condition of the goods, to be overborne by the actual price realized by him. I think we must regard the net proceeds (as without evidence of further expense, we must assume there are net proceeds),—as the plaintiff's and the loss partial. I am therefore of opinion that the rule *nisi* for a new trial must be made absolute with costs.

CORBETT v. MCKENZIE ET AL.

Before McDONALD, SMITH, JAMES, and WEATHERS, J. J.

(Decided December 18th, 1882.)

Misrepresentation in Contract of Marine Insurance.

PLAINTIFF applied for a policy of marine insurance stating in the application that the vessel was to coast principally from Canso to Halifax using P. E. Island and Newfoundland. The policy differed from the application, covering other risks than those applied for and containing exceptions not in the application. The vessel was lost on a voyage from Baltimore to St. Thomas, which was within the policy.

Held, that this was not a case of misrepresentation and that the insured was justified in sailing wherever the policy permitted.

This was an action brought by plaintiff, as assignee of Wier Bros. & Co., against defendant, as a member of the Chebucto Marine Insurance Association, to recover defendant's proportion of the amount insured by the Association on the hull, material, etc., of the schooner *Henry Trial*. The form of the application and of the policy appear in the judgment of the Court. The loss for which the action was brought occurred while the vessel was on a voyage from Baltimore, U. S., to St. Thomas, W. I. The cause was tried before Sir W. YOUNG, C. J., without a jury, when a verdict was found for plaintiff. A rule was granted to set the verdict aside.

Graham, Q. C., in support of rule.—Plaintiff is not shown to be the assignee. The representation in the application that the vessel was engaged in coasting was material. The law is clear that a material representation, made at the time of the application, if it is violated, vitiates the policy and disentitles the plaintiff to recover. *Arnould on Insurance*, 476 and 477. There is a distinction between representations of a state of facts, and of a mere expectation or belief. The latter, I take it, would not vitiate the policy. *McDonald v. Doull*, 3 R. & C., 276. In this case there was a condition that insurance should not be effected elsewhere. After the company found that the condition had been violated, they had a meeting, at which they cancelled the policy and charged the owner with the premium up to a certain day. It turned out that the vessel had been lost prior to that date. In the Supreme Court of Canada they held that the taking of the money constituted a new contract, and that the condition was waived. The vessel

was a small vessel of 45 tons. These small vessels, when engaged in coasting, go into harbor every night. The policy was on the vessel "coasting principally Canso to Halifax, using Prince Edward Island and Newfoundland." The latter words imply liberty to go the places mentioned, which would not have been necessary if voyages to those places would have been included in the word "coasting." (WEATHERBE, J.—The company did not give the policy applied for. The vessel was not enabled to use Prince Edward Island and Newfoundland under the policy. It is entirely different from what was asked for. You can go to all the world except certain places, which are expressly excluded.) The slip is as much part of the contract as the policy itself. (WEATHERBE, J.—It is available to show the contract where no policy is issued, but, where a policy is issued, applying to an entirely different state of affairs, I think it has nothing to do with it. McDONALD, J.—There is a great deal in that, I must confess.) Does the policy prohibit coasting? (WEATHERBE, J.—You cannot split the matter up in that way.) The reference to coasting, if it was in the policy, would be a warranty; not being so, it is a representation and must be material. As to representations before the issue of the policy, *1 Camp. Rep.*, 530; *3 Johnson's Cases*, 47; *1 Bennett's Fire Ins. Cases*, 689; *2 Duer*, 756; *2 Dowl.*, 263; *3 Bligh*, 202. (McDONALD, J.—My difficulty is, how can you represent a fact that does not exist? The policy, when issued, gave liberty to do that, which was afterwards done.) If it is represented that a vessel will sail on the 20th of next month, she must sail on that date if it is material. *Arnould*, p. 485. (McDONALD, J.—That was a case of misrepresentation. It was not representation at all.) It is not necessary to argue that the voyage entered upon was a departure from coasting. The vessel was 300 miles from land in the hurricane season; she was not at all adapted to such a voyage. (McDONALD, J.—It seems to me that 'until the policy is reformed the party must succeed.) Reformed in what way? (McDONALD, J.—According to the slip.) Representation need not be in the policy. The evidence is explicit as to the materiality of the departure. The policy grants the application for the coasting policy, subject to the usual

restrictions which exclude the vessel from the Gulf of St. Lawrence and ports in Newfoundland, after the 1st November. The papers, proceedings and decree of the District Court of the United States, were not admissible. There must be some evidence of the existence of the Court; judicial notice cannot be taken of it. *Revised Statutes*, chap. 96, sec. 27. (WEATHERBE, J.—All the act requires is that the document should purport to be sealed by the seal of the Court.) You don't have to prove the seal or the signature, but you must show the existence of the Court. There was not a line of evidence in the documents, supposing them to have been properly admitted, on which to compute the salvage. The Judge erred in failing to apportion the loss. The owner was insurer himself for a portion of the value, but the loss is all thrown on the underwriters.

Meagher, Q. C., contra.—The only plea is of misrepresentation. With regard to the admission of the decree of the New York Court, I presume it is not necessary to say anything. (MCDONALD, J.—I think not). The intention of the act is clear. The transfer is sufficient to show the plaintiff's authority. The defendants recognized him as assignee, by addressing him as such. Their letter is an admission, and, coupled with the other papers in evidence, disposes of that objection. The original resolution appointing the assignee was put in. The statute says a certified copy may be used for the purpose, but this is merely to facilitate the proof. (WEATHERBE, J.—No company should take up time with such defences.) One of the pleas was that there was not sufficient preliminary proof; there is nothing in that. The next question is as to the representation. The insurance was made by Wier Bros., the mortgagors, for their own benefit. *Bowden v. Vaughan*, 10 East, 415. In that case the representation was by the owner of the goods on board, and was held to have been only a representation of a probability over which he had no control. The case of *Bowden v. Vaughan* is referred to in *1 Parsons*, 420. If the insured states only his belief of certain facts, but has it in his power to make his belief conform to the fact, he would be bound. In the present case the insured could not state where the vessel was going, but

believed she would be employed "principally in coasting." *Arnould on Insurance*, 487. The insurers here rely solely on the misrepresentation. They should have pleaded equitably or have sought to reform the policy, which is different entirely from the application; the policy was not shown to have been issued on this application. (*Graham, Q. C.*—It is admitted.) *Parsons on Insurance*, vol. 1, p. 116. The circumstance of a difference raises a presumption of an intentional change. (McDONALD, J.—The policy is altogether inconsistent with the slip.) The words "usual exceptions," on the slip, could not refer to the printed part of the policy. If the exceptions were insisted upon it excluded the vessel from a large part of the coast. The materiality of the representation is a question for the jury, *9 B. & C.*, 693; *Arnould*, 530; and the finding is the other way. Where the Judge acts as jury the effect is the same; *3 C. P. Div.*, 495. The policy leaves us free to go anywhere, and everywhere, except the places specially excepted. Where the underwriter underwrites a policy inconsistent with the terms of the application, the policy is the sole evidence of the intention. *Arnould* citing *1 Douglas*, 284. As to the mode in which the calculation should be made, see *1 B. & S.*, 354. We got less than we were entitled to. As to constructive total loss, *5 Q. B.*, *1 C. P. Div.*, 358.

Graham, Q. C., in reply.—Cites *2 Duer*, 664, 665, in reference to *Bowden v. Vaughan*, 10 East. It was not represented to the underwriters that Wier Bros. were only mortgagees and not owners or persons having complete control of the vessel. There is nothing inconsistent between the application and the conditions in the policy. The usual exceptions in the slip are the usual exceptions in the policy. The writing on the policy and the printed part, must be taken together. The written words, "usual exceptions," must have been intended to call attention to the printed matter. The Judge below charged salvage, which he had no right to do, and gave no credit for two-fifths of the net proceeds.

WEATHERBE, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

The main ground taken at the argument was that though, by the policy, the insured vessel had a right to sail on the

voyage on which she sustained the damage, yet, in the application, there was misrepresentation on a material matter as to the voyage, that this amounted to a change of the risk and the policy is thereby vitiated. Reading the application and the slips together, we are of opinion that no misrepresentation can be made out, and that there is no ground for disturbing the verdict. We have already expressed our opinion on this point. The policy required is on a time risk, and in the application opposite the printed words "voyage at and from," these words are written in "Date to 31st December, coasting principally Canso to Halifax, using P. E. Island and Newfoundland." In the policy this clause is the important one in this cause. "The exceptions on the time risks are as follows:— Prohibited from the River and Gulf of St. Lawrence, and Ports in Newfoundland, and between the 1st November and the 1st May, without payment of additional premium or leave first obtained." The Gulf of St. Lawrence within the meaning of this policy, is defined to be northward of Cape Jack, N. S., and Low Point, C. B., Strait of Canso, and inward from Cape North in Cape Breton, and Cape Ray in Newfoundland. Sealing voyages and voyages to Greenland and Iceland are risks also excepted, and "not to use the ports of Schooner Pond, Blockhouse Mines and Chimney Corner, except during the months of June, July and August, the use of such waters not to vitiate this policy except during the time such waters are used." It will be seen that the assured applied for a policy permitting the use of the waters to Newfoundland and P. E. Island, which includes the Gulf of St. Lawrence. The policy issued is not in accordance with the application and excludes the assured from most of the waters of which he required the use in the application. We think the insured, on the issuing of this policy, was justified in sailing wherever the policy itself permitted, and we fail to see anything like misrepresentation, which induces us unanimously to say that upon this part of the case the defendant must fail. There are forty underwriters to this policy, and it would be worthy of every consideration that only such points should be raised as are actually in contention between the parties. Another ground was taken, but not strongly pressed; indeed, no argument was addressed to us on the subject, viz: that in the

memorandum filed by the learned Judge who heard the cause, he failed to shew whether he had found for a total or partial loss. We think the sum found by him in his verdict is not too great, and can be sustained on the evidence, and no authority has been shewn for disturbing the verdict for the reason mentioned. It is not, we think, necessary to discuss the evidence objected to, as there is sufficient evidence without that to sustain the verdict under our statute on that subject.

MCDONALD, SMITH and JAMES, J J., concurred.

MCKAY v. WOODILL.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided December 18th, 1882.)

Verdict for Plaintiff, by mistake, entered for Defendant. — Jurisdiction of Court to set the verdict aside.

In an action for maliciously procuring an execution to be issued against the plaintiff, the Judge put to the jury the question whether the defendant issued the execution knowing or believing that nothing was due to him by the plaintiff; if not, the verdict to be for the defendant. The jury answered the question in the negative, but found a verdict for plaintiff. The Judge on circuit, on motion, ordered a verdict to be entered for defendant with leave to move. After argument of the rule nisi to set aside the verdict for defendant,

Held, that there was no authority, after the verdict for plaintiff was rendered, to enter a verdict for defendant, and that the Court *in banc* had jurisdiction to grant a rule nisi to set it aside.

On the trial of this cause, which was an action for maliciously procuring a writ of execution to be issued against the plaintiff, the learned Judge who presided put the following question, in writing, to the jury:—

“Did Woodill issue this execution, knowing or believing that nothing was due to him by the plaintiff?”

If they answered this question in the affirmative their verdict would be for the plaintiff; if in the negative for the defendant.

The jury answered the question in the negative, but returned a verdict for plaintiff, which was recorded by the Prothonotary. On motion of defendant's counsel, the Judge directed a verdict to be entered for defendant, instead of the verdict for plaintiff, with leave to the opposite side

to move to set the same aside as improperly entered, within the first four days of next term at Halifax.

On the first day of the term a rule *nisi* was obtained to set the verdict aside, on the grounds following:—

1. That the jury having found a verdict herein for plaintiff, and the same not having been set aside, the same remains, and judgment should be entered herein for the plaintiff.

2. Because the verdict was improperly entered up as a verdict for defendant.

3. Because, the jury having found a verdict for plaintiff, the learned Judge had no power or authority to cause a verdict to be entered for defendant, and the same was illegal and irregular.

The rule now came on for argument.

MacCoy, Q. C., raises preliminary objection that the rule *nisi* to set aside the verdict in this case was moved for and granted by the Supreme Court *in banc* at Halifax, on the first day of term, on leave granted by the Judge who tried the cause, instead of being granted by the Judge on Circuit, or taken out under the statute. The Court has no jurisdiction here. *L. R.*, 7 Q. B. Div., 555. The *Practice Act* regulates the practice in regard to rules to set aside verdicts. Under it the Judge is the sole party to decide whether he will grant a rule *nisi* or refuse it. He must do one or the other. When he refuses, and then only, a rule passes under the statute. This Court has no jurisdiction over verdicts at *nisi prius*, except by appeal. Cites *Chipman v. Gavaza*, 1 *Ritchie's Equity Dec.*, 28; 9 *M. & W.*, 42; 3 *Dowl., Pr. R.*, 643; 7 *C. B.*, 768-770; 10 *M. & W.*, 556.

Graham, Q. C., in reply.—Under the English practice, if a Judge nonsuits, reserving a point, the Court *in banc* confirms the nonsuit or directs judgment the other way. Where, in England and Ontario, no point is reserved, the party moves the first day of term. In *Copp v. Etter*, James, N. S. R., 304, the rule was moved, pursuant to leave, on first day of term at Halifax. The statute then was the same substantially as now, as to rules *nisi* for new trials. Section 220 of chap. 94. *Revised Statutes*, gives general power to the Court to grant rules *nisi* on the first day of term without hearing the other

side. The English practice as to granting rules *nisi* for new trials has not been repealed by our statute. Our statute only provides for rules passing with security, when the Judge refuses to allow a rule.

On the merits of the rule *nisi*.

Graham, Q. C., in support of rule.—The jury here, after finding a special fact, and being instructed by the Judge upon that finding to find a verdict for defendant, found a verdict for plaintiff, which was recorded in open Court. Afterwards, instead of granting a rule *nisi* for a new trial, the Court, on motion of defendant's counsel, ordered a verdict to be entered for defendant.

MacCoy, Q. C., contra —The jury first brought in a special finding as to probable cause. Immediately upon that I moved the Court to direct a verdict to be entered for the defendant. According to the minutes the only verdict entered is the verdict for the defendant. The first finding, as to probable cause, was the verdict of the jury, and after that the jury could find no other verdict. They had no power to bring in the verdict for plaintiff. The facts in evidence show that the defendant was entitled to a verdict, and practically obtained a verdict. If the Court come to the conclusion to make absolute this rule, because a verdict was recorded here by the Prothonotary, before my motion, we should not, at all events, be made to pay costs. Cites *Tanner v. Ambler*, 10 Ad. & El., N. S., 252. (WEATHERBE, J.—If I can find any authority for making costs abide the event, I shall be very glad. I know of none.)

Graham, Q. C., in reply.—Holding a verdict here, we do not intend to go back for a new trial, if this rule is made absolute. As to the question of costs, the misfortune of defendant has been brought on by the mistake of counsel in moving that a verdict be entered for defendant, after a verdict had been entered for plaintiff, instead of taking a rule *nisi* to set aside the original verdict. If he had done that, we would have been prepared to uphold the original verdict, as being good under the law and evidence. Cites *4 F. & F.*, 443. No Judge can enter a verdict, against or without the consent of the jury, unless by consent of counsel.

SMITH, J., now, (December 18th, 1882,) delivered the judgment of the Court :—

We think the verdict for defendant must be set aside, as there was no authority, after the verdict for plaintiff was rendered, to enter a verdict for defendant. We also think that this Court had jurisdiction in the case to grant the rule *nisi*.

OVERSEERS OF POOR *v.* DAVIDSON.

Before McDONALD, SMITH, and WEATHERBE, J. J.

(Decided December 18th, 1882.)

Order of Filiation.—Meaning of words, “To become chargeable.”

DEFENDANT objected to an order of filiation made at the instance of the Overseers of the Poor for Maccan on the ground that, although the mother was resident at Maccan when the child was born, the legal settlement of the mother was the Township of Parrsboro’.

Held, that the father was liable to the plaintiff township, the words “likely to become chargeable to any township,” being equivalent to “likely to need relief from any township.”

This was an appeal from a decision of W. A. D. Morse, Esquire, Judge of the County Court for District No. 5, on a case submitted to him on appeal from an order of filiation. The facts, as admitted in the case submitted, were as follows :

The defendant is the father of the child mentioned in the order of filiation, and the said child is a bastard, and the said Olive Phinney is its mother.

The said Olive Phinney, at the birth of the said child, on the nineteenth day of January last past, was residing at Southampton, in said Township of Maccan, and had been residing there for over five years previously, and had supported herself by her own earnings, but has not thereby lost or changed her settlement in Parrsboro’.

The legal settlement of the said Olive Phinney, under the Poor Act, is in the Township of Parrsboro’, in this County, which is a properly constituted Poor District, with Overseers of the Poor.

The said Olive Phinney, by application in her behalf to the Overseers of the Poor, at Southampton, received aid from said Overseers for herself and her said child, since birth of child, being paupers and residing in said Township of Maccan.

The plaintiffs are the duly appointed and qualified Overseers of the Poor of the Township of Maccan, a properly constituted Poor District.

And all the facts necessary to make the said order of filiation appealed from herein valid, are admitted, except that the said defendant will contend that the plaintiffs, the said Overseers of the Poor for the Township of Maccan, are not competent and proper parties to prosecute him herein.

The following is the judgment appealed from :—

In this case, submitted to me, and filed March 14th, 1881, it is admitted that all the proceedings are regular, and that all facts necessary to justify the order of filiation, etc., exist.

The contention on the part of the defendant's counsel is that, inasmuch as the settlement of Olive Phinney was in the Township of Parrsboro', and not Maccan, the Township of Maccan could not, through its Overseers, institute these proceedings to indemnify itself, but should have taken proceedings under chap. 33 of the *Revised Statutes*, (4th Series,) and sent the mother and child to Parrsboro', for Parrsboro' to take these proceedings, if it pleased. This is not a case of disputed settlement. Neither Parrsboro' nor Maccan is contending as to settlement. In this case the Township of Maccan is simply seeking to indemnify itself as against "the child that has been and is likely to become chargeable to it."

This language is, to my mind, conclusive. If it were possible for the putative father, in a case like the present, to raise this defence, in cases frequently occurring the question of settlement would have to be first determined, and, while the townships were contending, the three months referred to in section 7, chap. 35 would expire, the criminal would escape and the indemnity would be lost.

I, therefore, confirm the order of filiation.

Attorney-General in support of appeal, cites section 4, chapter 33, *Revised Statutes*.—Illegitimate children shall have the settlement of the mother. The only remedy of the plaintiffs was under the removal process. The Overseers of Parrsboro' have a clear right to be indemnified, and two townships cannot have such a right. Chapter 3, Acts of 1881, provides for an appeal in this case. The common law and

the statute law, anterior to *Cap. 33 Rev. Statutes*, was the reverse of the law there enacted. The authorities show that the place of settlement is the only place that can seek indemnity. *Burn's Justice*, vol. 3, p. 23 ; vol. 1, p. 167, p. 26, (title Poor.) The right of a township to indemnity is only against a child likely to become chargeable ; this must be the township where the mother has a settlement. (MCDONALD, J.—There is nothing to show that the order of filiation was not to indemnify the Township of Parrsboro'.

Meagher, Q. C., contra.—There is no appeal in this case. The judgment appealed from was on the 5th of April, 1881. The statute under which the appeal is taken was passed on the 14th of April, 1881. (*Atty-General.*—Unless the time for appealing had expired, the act would apply. In *The Queen v. Taylor* the time for appealing had expired.) The case of *The Queen v. Taylor*, 1 Sup. Court of Canada, does apply. Sec. 10 of chap. 35, *Revised Statutes*, makes the decision of the Court appealed to final. It was to meet that difficulty that the Act of 1881 provided for further appeal, and that provision could not apply to cases previously determined. Cites the *County Court Act of 1880*, section 19. The original County Court Act of 1874 does not seem to contain any provision for appeals to County Court in bastard cases. The appeal to County Court is given in section 7 of chapter 6 of the Acts of 1877. None of these sections repeals section 10 of chapter 35, *Revised Statutes*, which makes the judgment of the appellate court final. The only question to be tried by the Justices under chapter 35, *Revised Statutes*, is the paternity of the child. It is admitted that the Overseers of Poor, when the child is born, are obliged to provide for the mother and child until the making of the filiation order. There is not a word about finding the settlement of the child, and the Justices have no jurisdiction to try the question of settlement. The overseers of the district where the mother has a settlement, are not liable until after the overseers of the district where the confinement takes place, have given the notice and request under section 18 of chapter 33, *Revised Statutes*. Sections 8 and 9 of that chapter apply only to the expenses of removal. (WEATHERBE, J.—I agree with you as to the construction of

those sections.) The fact of the child being born in the township indicates that it is likely to become chargeable. The mother might have no settlement, or it might not be known. There is no proof that the order of filiation and bond were not to indemnify the Township of Parrsboro'. The words of the statute are, "is likely to become chargeable." If the legislature intended that only the township upon which the child was absolutely chargeable should have the right to proceed, the provision would have been different. *2 Salk, 475 ; 4 M. & S., 559.*

Attorney-General.—In *The Queen v. Taylor* it is clear that the act was passed after the time for appealing had expired. The Judge has exercised his jurisdiction of stating a case.

WEATHERBE, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

It is impossible to say, by the printed case presented to us, in what way the proceedings in this matter were instituted, but that may not be material. The settlement of the mother, it is admitted,—and, therefore, by section 4, chap. 33, *Revised Statutes*, the settlement of the illegitimate child also,—is Parrsboro'. It seems to be the contention of defendant that although the mother, while in Maccan, and about to give birth there to the bastard child, was likely, with the child, to need relief, the father could not be required to enter into a bond or be subject to an order of filiation under sections 1, 2 and 3 of chapter 35, *Revised Statutes*. These are the sections:—

1. If any woman shall become pregnant with a bastard child likely to become chargeable to any township, she shall make oath in writing before a justice for the county where she resides that she is so pregnant, and who is the father of the child ; and such justice shall forthwith issue his warrant to apprehend the reputed father and cause him to be brought before him or some other justice of the county.

2. The reputed father when brought before a justice, shall be required to enter into a bond, with a surety, to indemnify such township until after the birth of the child and until an order of filiation shall be made thereon, or till

the reputed father be discharged on examination and hearing preparatory to the passing such order; and in default shall be committed to jail to remain until such examination and hearing can be had or such bond given.

3. As soon as convenient after the birth of the child, two justices, on application of an Overseer of the Poor or some substantial householder of such township, shall issue a warrant to bring the mother and reputed father before them at a time and place therein mentioned, and shall hear the evidence of the mother, the reputed father, and of any other person, and shall either discharge the reputed father or make an order of filiation to indemnify the township for the expenses connected with the lying in and maintenance of the mother and the birth and maintenance of the child to the date of the order, and that the reputed father pay such sum weekly as they shall consider right, respect being had to his ability, towards the support of the bastard child while chargeable to such township.

The whole case turns on the signification of the words "to become chargeable"; and they mean, as numerous cases show—and the statute is clear—"to need relief." I have not a doubt that the father is liable to the plaintiff township, if proceedings have been properly taken, and it is admitted they are properly taken. The appeal will, therefore, be dismissed with costs.

CRITTENDEN v. THE MUNICIPALITY OF GUYSBOROUGH.

Before SMITH, JAMES, and WEATHERBE, J. J.

(Decided December 18th, 1882.)

Motion to Rescind. Laches. Accounting for Delay.

RULE nisi to rescind an order of a Judge at chambers discharged where the motion was delayed and the delay not sufficiently accounted for.

On the 22nd of February, 1881, an order absolute was made by Mr. Justice WEATHERBE, in which it was ordered that disputed matters of fact in connection with an award of damages to the plaintiff for land taken for the Eastern Rail-

way Extension, be tried "by and before the Court and jury empannelled to try causes at the next term of this Honorable Court at Guysborough."

On the 2nd of April, 1881, on motion of defendants' counsel, a rule *nisi* was granted to rescind the order absolute of the 21st February. The rule *nisi* was obtained on the two following affidavits:—

I, Samuel G. Rigby, of the City of Halifax, Esquire, make oath and say as follows :

I say that I was retained by the Municipality of the District of Guysborough to appear for them before the presiding Judge at Chambers, in the Court House at Halifax, in obedience to the summons to that effect made in this matter by the Honorable Mr. Justice McDONALD, dated the sixteenth day of November, A. D. 1880, a copy of which is annexed to the affidavit of William Hartshorne made herein.

That said summons came on to be heard before the Honorable Mr. Justice WEATHERBE at Chambers, and was adjourned from time to time until finally an order absolute was made herein by His Lordship on the 22nd day of February now last past, a copy of which is annexed hereto marked A.

That on behalf of said municipality the following were used before the learned Judge as grounds why said summons should be discharged.

1. That those provisions of chapter 70 of the *Revised Statutes* of Nova Scotia, third series, under which said summons was issued, were not applicable to the Railway in question, and that said summons was granted without authority therefor.

2. That the land intended to be taken for said Railway, was not properly dedicated by the proper person.

3. That the above named plaintiff and appellant had not brought the proceedings properly before the Judge, or sufficiently established his right to the relief sought.

4. That the proceedings were illegal, and bad in being taken against the Municipality of the District of Guysborough alone, that they ought also to have been taken against the Municipality of the District of St. Mary's, and that the proceedings were improperly headed.

That the day said order absolute was served upon me, I wrote to the Clerk of said Municipality, A. H. McGillivray, Esquire, informing him of the decision of the Judge, but received no answer or instructions from him, until the 11th day of March. instant.

SAMUEL G. RIGBY.

I, Alexander McGillivray, of Guysborough, in the County of Guysborough, Barrister-at-Law, make oath and say as follows, that is to say :—

First. I am Attorney herein of the Municipality of the District of Guysborough, the above-named defendant and appellee.

Secondly. I say that on or about Saturday, the twenty-sixth day of February last past, I received a letter from Samuel G. Rigby, Esquire, of the City of Halifax, Barrister-at-Law, dated at Halifax the 22nd day of the said month of February, informing me that Judge WEATHERBE made an absolute order in this matter, said letter having been detained or delayed, as I verily believe, by the non-receipt of mail from Halifax at Guysborough for the period of four or five days, in consequence of the blockading of the railway by the recent snow storms.

Thirdly. I say that on Monday, the twenty-eighth day of the said month of February last past, I left Guysborough for New Glasgow, in obedience to instructions received by me as Census Commissioner for the County of Guysborough, to meet George Johnson, Chief Commissioner for the Province of Nova Scotia, at New Glasgow, aforesaid.

Fourthly. I did not return home from New Glasgow to Guysborough until the coming of Friday following, having been detained in New Glasgow by the irregular running of the Eastern Extension Railway.

Fifthly. In consequence of the delay in receiving the said letter addressed to me by the said Samuel G. Rigby, and my unavoidable absence from home at New Glasgow, as above stated, it was impossible for me to submit the matter to the Warden of the Municipality of Guysborough for his consideration and advice, and instruct said Samuel G. Rigby, at an early day to rescind the said order herein.

Sixthly. Immediately on my return from New Glasgow I proceeded, by the advice of the Warden of said Municipality, to instruct the said Samuel G. Rigby to move the Court to rescind the said order.

(Sgd.) ALEX. H. MCGILLIVRAY.

On the argument of the rule *Ritchie, Q. C.*, and *Bligh* appeared for the plaintiff, and *Graham, Q. C.*, and *Weeks* for the defendant. A lengthy argument occurred on the grounds in the rule, but in view of the decision of the Court, it is unnecessary to report it.

Ritchie, Q. C.—The motion to rescind the rule is made too late, and the delay is not accounted for. Defendants had an appeal and could not move to rescind the order without showing how their appeal was lost. *Chitty's Arch.*, 1609.

Graham, Q. C., in reply.—The Judge sat as an independent tribunal, and there was, consequently, no appeal. The proper course was to apply to set aside the order. *Chitty's Practice*, vol. 3, p. 33. The plaintiff should show that there was *laches*. The delay has been accounted for.

SMITH, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

This was a rule taken out to set aside an order given by Mr. Justice WEATHERBE at Chambers, from which there was an appeal. We think there was *laches* in delaying for so long a period to apply for the rule. The affidavits read on the argument to account for the delay do not appear to us sufficiently to do so. We therefore think the rule must be discharged.

BERRY v. BERRY.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided December 18th, 1882.)

Forfeiture.—Receipt of rent after action.—Nonsuit.

PLAINTIFF made a lease for lives. The lessee conveyed to the defendant in fee simple and afterwards assigned to him the lease. Defendant paid rent to the plaintiff both before and after action of ejectment brought by plaintiff. In this action plaintiff relied on the forfeiture of the lease by the making of the deed in fee simple, but it appeared that plaintiff was not aware of this fact until after action brought. The Judge recommended a nonsuit which was accordingly entered, but the Court set it aside as there was some evidence that plaintiff had treated defendant as a yearly tenant and not merely as holding under the lease.

Per JAMES, J., that the conveyance in fee did not create a forfeiture.

This was an action of ejectment, tried at Amherst, before McDONALD, J., in June, 1880. The party through whom defendant claimed, who was a tenant during the lives of two persons, made a conveyance in fee, after which plaintiff, although not then aware of the forfeiture, brought his action. At the trial evidence was given of the receipt of rent by plaintiff, after action brought. The learned Judge, on these facts, recommended a nonsuit, which was entered accordingly, and a rule granted to set the same aside. The rule now, (February 9th, 1882,) came on for argument.

Townshend, Q. C., in support of rule.—Plaintiff did not know of the deed when he received the rent. *Jones v. Carter*, 15 M. & W., 718; *Grimwood v. Moss*, L. R., 7 C. P., 360. The latter case goes fully into the whole subject. It is held that a forfeiture is not waived by a subsequent act, and that ejectment may be brought for a forfeiture on any ground not waived before the commencement of the action. *1 C. & P.*, 346. The latter [case is a clear authority for the principle that the acceptance of rent, after the commencement of an action of ejectment for a forfeiture, is no waiver. A conveyance by a tenant constitutes a forfeiture. *Woodfall's*, L. & T., 288, and cases cited; *5 T. R.*, 641; *Lloyd v. Powell*, 5 B. & C., 208; *Mitchenson v. Carter*, 8 T. R., 57; *3 M. & S.*, 353. The question of waiver should have been left to the jury. There can be no waiver where there is no knowledge, and no knowledge is shown. (WEATHERBE, J.—Leaving the question of knowledge out, there was the strongest evidence of a waiver.

The case should have been disposed of absolutely, instead of by a nonsuit.)

Henry, Q. C.—There is nothing here to show that the nonsuit was accepted reluctantly or in deference to the opinion of the Court, which has been thought to be necessary. (*Graham, Q. C.*—I have a brief on that point, if it is to be argued. *WEATHERBE, J.*—I have not a very strong opinion one way or other, except that where a nonsuit is voluntarily accepted there can be no motion to set it aside.) There can be no doubt that the deed was made in mistake, as it was followed nine months afterwards by a proper assignment, the intention being simply to assign the lease. I merely mention this, not attempting to make any argument upon it. The effect of a deed by a lessee in working a forfeiture is based on a case in *Cro. Eliz.* The right to enter for breach of covenant arises where there is an express condition for re-entry. In addition to this there are cases of implied covenants with implied condition of re-entry, of which the present case is one. The latter cases are similar to the former in their conditions and incidents. The giving of the deed in question was such an act as would entitle the plaintiff to re-enter or bring ejectment. That being the case, we have to inquire into the relations of the parties subsequent to the act. The deed was given 23rd January, 1872, and the action was brought 14th May, 1874. We have evidence of the payment of rent during almost the whole of the period intervening between these two dates. There is uncontradicted evidence that the plaintiff was not aware of the deed until six months after action brought. The right of re-entry is a strict contract right, express or implied. The forfeiture must be followed by an election by the party entitled to avail himself of it, and it is clear that there can be no election where he is not aware of the forfeiture. *Woodfall*, 8th edition, 279 ; *Cole on Ejectment*, 208. (*WEATHERBE, J.*—The contention is that the bringing of the action was the election.) There is no case to that effect. The plaintiff was in the same position when he brought his action as if no forfeiture had taken place ; he was not in a position to make an election until six months after action brought. *Fenn v. Smart*, 12 East., 444 ; 6 B. & C., 519 ; 9 D. & R., 536 ; 4 B. & Ad., 664 ; 4 C. B., (N. S.), 537. The waiver itself is not

effective, if done in ignorance. The right to proceed for the forfeiture and the waiver depend on the same principle. There must be knowledge. Assuming the original tenancy to have been determined by the forfeiture, the defendant having paid rent from year to year, a new tenancy arose which could only be determined by notice. *Rigg v. Bell*; *Clayton v. Blakie*; 2 *Smith's Leading Cases*; *Woodfall*, 207, 208; 2 *Esp.*, 717. Where a tenant whose term has expired continues in possession, he is not a tenant from year to year, but at will; *aliter* if rent is received. 2 *B. & C.*, 100, is an express decision to the effect that whether a yearly tenancy arises on the determination of a tenancy for years, where rent is paid, is a question of law. 8 *Q. B.*, 95.

Graham, Q. C., in reply.—Knowledge of the principal is not essential. An entry of a stranger without authority is effective, if ratified. 2 *Str.*, 1128. The ratification of the bringing of the action of ejectment here is a sufficient election. (WEATHERBE, J.—That was after the bringing of the action. The stranger must have the consciousness in order to a ratification.) It comes to this that although you do the act required, something has not taken place in your mind. There is no law for that. It is the act and not a mental operation that must be looked to. (*Henry, Q. C.*—The bringing of the action does not unequivocally relate to the forfeiture. It may relate to some entirely different matter.) *Woodfall* says nothing about a mental consciousness, but an act evidencing intention. Here there was both the act and the intention, of which the defendant had notice; and there should be some authority to show that, under these circumstances, the plaintiff is not entitled to avail himself of a good ground, merely because he was not aware of it at the time the action was brought. Under the decision of Mr. Justice WILLES, cited above, he is entitled to go on "every ground that may turn out to be available." If the question here is of intention on the part of the plaintiff, it should have been submitted to the jury. 1 *Cowper*, 243. The moment it is admitted that the act of bringing the action of ejectment was equivocal, the question of intention arises, and should be submitted to the jury. It cannot be said that the attorney, in bringing the action, did not make an election, and forfeit. (WEATHERBE, J.—The want of knowledge which

is allowed to operate in law, operates in favor of a party. SMITH, J.—When he issued the writ, your argument is, he elected to avail himself of any grounds then existing. *Henry, Q. C.*—The notice of election is shown by the evidence to have been fallacious.) The tenancy here was not terminated till the action. There is in evidence here a notice of demand of possession, which is an act of election by the plaintiff himself, indicating his intention to forfeit the lease.

WEATHERBE, J., (December 18th, 1882,) delivered judgment as follows:—

Grimwood v. Moss, L. R., 7 C. P., 360, was ejectment against a tenant for breach of covenant. Lessors distrained for rent after action and before trial, and the bringing of the action was held to be equivalent to entry to determine the lease on the ground of forfeiture, which had not been waived by the distress after the bringing of the action for rent due to the time of breach of the covenant. It was also held that if the distress was not justifiable under statute, it was a trespass. In the case before us the lessee conveyed the fee simple to defendant, and afterwards assigned the lease to him. Defendant paid rent to plaintiff to within a short period before action, who went on after action receiving the annual rent. He did not become aware of the act of forfeiture till after action and after the last receipts of rent. It was contended that there was no entry to determine the lease but the cases show, and *Grimwood v. Moss* is authority that the action of ejectment is sufficient. Then it was contended that as the plaintiff was not aware of the act of forfeiture, he cannot now take advantage of that. WILLES, J., in the case cited says: "This doctrine is laid down as the law in the case of *Jones v. Carter* by Lord WENSLEYDALE without any reference to the existence of particulars of demand in the clearest and most satisfactory manner. I am not prepared to be the first to shake or fritter away the authority of that case. I entirely agree that the true principle upon which that decision was founded was that the bringing of the action of ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party

claiming to re-enter. In the case of *Dr. Grenville v. The College of Physicians*, Lord HOLT laid it down that a person doing a lawful act was not bound by the ground he alleged for doing it, but might justify it on any ground that existed in fact. The act of entry is one of those acts in *pais* mentioned in the judgment in the case of *Lyon v. Reid*, which bind parties by way of estoppel as being acts of notoriety not less formal and solemn than the execution of a deed. It is quite clear if the landlord instead of bringing ejectment had entered he could have justified in an action of trespass by reference to any act of forfeiture which he could prove. In my opinion the subsequent distress can make no difference. If the landlord had entered a distress on the goods of the tenant would not have defeated the effect of his entry. Apart from any statute it would be a simple act of trespass; and whether it be justified by the Statute of Anne or not it is immaterial."

Is not the case under consideration to be distinguished from that just cited? Simply because the defendant happened to be the party to whom the lessor conveyed the fee, will not, I think, subject him to be turned out, if he is to be treated under this evidence as a yearly tenant, without notice. It appears to me that the fact of his being a party to the deed is not the turning point of the case, and if there is no evidence that he was treated by plaintiff as succeeding the lessee, and as being substituted in his place, then he is not to be ejected on the ground of forfeiture at all, but must have notice. Our attention was not sufficiently turned to this, the very point to be decided. By the plaintiff's own evidence he does not seem to have recognized defendant as holding under the same lease and paying the same rent reserved, and if not, we do not see very well how he can prevail against the nonsuit. We are to examine the receipts given by plaintiff for the rent. One of these receipts contains evidence for the jury, on the point mentioned, and we cannot uphold the nonsuit.

SMITH, J., concurred.

JAMES, J.—The plaintiff, being the owner in fee simple of the lands sought to be recovered in this action in 1862, gave a lease to Charles Edward Berry and others, for the natural lives of one

Robert Berry, his wife, and his sister Lavinia, and the natural life of the longest liver of them. In 1872 Charles Edward Berry, being a tenant for life, conveyed the same lands to the defendant, Joseph Allen Berry, and his heirs. It appears, by the evidence, that Robert Berry had died before the conveyance was made, but there was no evidence of the death of his wife or sister. The plaintiff claimed that by giving a deed in fee simple, pending the lease for life, the defendant had forfeited to the plaintiff the land in question. At the argument it was admitted by counsel for defendant, that the conveyance in fee, relied on by the plaintiff, was sufficient to create a forfeiture, and as this is not my view of the law, and the question is of supreme importance, I take the opportunity of discussing, as briefly as I can, the question whether the common law doctrine of forfeiture prevails in this Province, and, if it does, under what conditions. I have given this very important question a great deal of attention and research, and I can find but one reported case, to which I shall hereafter refer, in the Law Reports of the United States, and none in the reports of Ontario, of New Brunswick, or of this Province, in which the Courts have recognized and given effect to the law of forfeiture; but we have had, in this Province, a decision of this Court directly at variance with the plaintiff's contention in this cause. That cause was *Lecain v. Wieland*, decided in December, 1862, by the full Bench, at Halifax. It was not reported, there being, at that time, no official reporter, and as no written opinions were delivered, no report of it has appeared in the collection of Nova Scotia decisions. I append, in a note hereto, a statement of the case prepared from *data*, in my possession. I was defendant's counsel and advised and conducted the defence, and the materials in my hand are sufficient to permit me to vouch for the accuracy of the subjoined report.*

* BENJAMIN LECOIN vs. HENRY WIELAND—Trespass *qu. cl. fr.*

Pleas. 1, Plaintiff not possessed. 2, The land not the plaintiff's. 3, That the land is the soil and freehold of defendant and two others, under whom he justifies.

This cause was tried before BLISS, J., and a jury, at Annapolis, in October Term, 1862. The following is a copy of the Judge's minutes of trial:—

"Cowling opens.

"Plaintiff sworn.—I reside at Clements and have 50 odd years. I hold a lot of land under deed from Elizabeth Wieland. It is in Clements. Will of Henry Wieland put in and read

Although the opinions entertained by the Court are not expressly reported, the cause is so far in point that the Court stopped defendant's counsel supporting the position that the deed did not work a forfeiture, and called on the opposite party; and I may fairly cite it as indicating conclusively the opinion of the Court on that point. I shall endeavour to show why that opinion ought to prevail in this case.

The question resolves itself into an enquiry into the character and nature of the deed to the defendant. It is the ordinary deed in use in this country, and, indeed, the ordinary deed in fee simple used throughout the United States and these North American Colonies, in which the laws of England prevail. There is a general identity between those in use in these countries in every substantial particular. I shall con-

dated 22nd October, 1818. It is admitted that Jacob Wieland, the testator's son, mentioned in the will, is since dead, leaving three children heirs at law,—the defendant, Henry Wieland and John Wieland and Charlotte Medicroft, under whom the defendant justifies; that the widow, Elizabeth Wieland, died 15th May, 1861, without having again married.

"Deed from Elizabeth Wieland to plaintiff is put in, dated 28th April, 1829, of No. 12, being that mentioned in the will of Henry Wieland. The plaintiff claims under this deed, having been in possession of the land ever since.

"The defendant claims, under the will, to be entitled to lot No. 12, after the limitation of the life estate of the widow, Elizabeth Wieland, and that the trespass complained of is their entry on the land in assertion of their right.

"The plaintiff, on the other hand, contends (1) that the deed of the widow, in fee, was a forfeiture of the life estate, and (2) that the right of the heirs, who severally came of age 22nd August, 1840; 29th May, 1843, and 13th September, 1845, was barred by the statute of limitations. They not having entered within ten years after such forfeiture, the disability of infancy was removed. The will of Henry Wieland gave to his widow, Elizabeth Wieland, his real estate for life, with remainder to his son, Jacob Wieland, the father of plaintiff, and under whom he claims the fee simple."

The deed to plaintiff from the widow, like that before us, was the ordinary conveyance of the country, but without warranty of title. In consideration of £100 it "granted, bargained, sold, aliened, released and confirmed," habendum to plaintiff "his heirs and assigns forever."

JAMES, J., for defendant, on these facts moved at the trial, for nonsuit, on the ground that the deed to plaintiff, not being a deed of feoffment, with livery of seisin, did not create a forfeiture; which the learned Judge was about to grant when he was informed by plaintiff's counsel that Mr. Johnstone, the Attorney-General, had, some years previously, advised the action on the ground of forfeiture, in deference to whose opinion the Court reserved the question and directed a verdict for plaintiff, subject to the opinion of the Court.

At the argument in Michaelmas Term, JAMES, for defendant, moving to set aside the verdict on the above ground, was stopped by the Court, who called on the Attorney-General. Mr. Johnstone stated that it was a misapprehension, that he had advised that there was a forfeiture, and, after a brief discussion of the question with the Court, declined to attempt to sustain the verdict on that ground; that he had looked into his second point, whether the heir was bound to enter within ten years, and found that it was not required, and he could not maintain that ground. But he contended that under the will the widow took a fee simple, and therefore, the title was good in plaintiff without the forfeiture. But the Court said the point was too clear against him to be argued, and granted the rule to set aside the verdict with costs.

Judgment for plaintiff.

sider the origin and nature of this deed, for upon its character depends the solution of the question whether it has worked a forfeiture of the life interest conveyed by the plaintiff and not yet expired. Is it such a deed as would work a forfeiture? And I shall endeavor to demonstrate that it cannot be such a deed unless, at least, it is proved that it is a deed of feoffment with livery of seisin. If it is a conveyance deriving its efficacy from the Statute of Uses, or of any other character than a deed of feoffment with livery, it will not work a forfeiture. The position I shall endeavor to establish is that whatever other character it may possess, although it is as between the parties to it and their representatives, an effectual conveyance of the land, yet, as between either of them and a stranger, it is not a deed of feoffment, because there is no evidence of its having been accompanied with livery of seisin. The deed in question includes no covenants except as against parties claiming under the grantor. But it profess to "grant, bargain, sell, alien, remise, release enfeoff, convey and confirm to the grantee, his heirs and assigns," thus using the language of almost every species of conveyance by deed known to English law. Without analysing each of them, I may remark that in form, as far as merely the words go, it may be either a feoffment, a deed of bargain and sale, of release or of confirmation, and superadded to all these are the words "alien" and "convey," both of which are general expressions, including every species of conveyance. Are all these words necessary? I think not. Probably almost any one of them would be sufficient, if there was livery of seisin. In New Brunswick, where the registry of a deed is made for the purpose of conveyance only a substitute for livery of seisin, it has been held that the words "remised, released, and quit claim," followed by a habendum to heirs, passed a fee simple by virtue of the constructive livery created by the registry of the deed.

The universal use and prevalence of this form of deed on this continent, and even in England, cannot be accounted for by the doctrine of estoppel. That it may work by estoppel, and that whenever it contains express covenants and warranty of title, it will estop the grantor and his representatives, is well established, both in England and the United States. *Goodtitle v. Morse*, 3 L. R., 365; *Hilliard on Real Estate*,

2615, sec. 89 ; *Bigelow on Estoppel*, 362 ; and by virtue of such warranty an estate passes by estoppel or rebutter. But the conveying power of a deed is not dependent on the warranty or covenants ; a mere quit claim deed will convey the title of the grantor as effectually as a deed with warranty. And I do not find that the mere use of the word "enfeoffed" in a deed has been held to estop the grantee to deny that livery of seisin accompanied the conveyance. Neither is the mere possession by the grantee of the land, or even delivery of possession by the grantor, evidence of livery of seisin, which is a formal act, with its incidents as well settled as those of the execution of a deed. The Courts will look favorably upon any evidence calculated to raise a presumption to sustain a *bona fide* title to real estate, as against a tortious claim. I need not argue that the claim of the grantor to a forfeiture—the claim which the plaintiff sets up in this action—is tortious, because that has been declared by an English Act of Parliament, 8 and 9 Vic., chap. 106, in abolishing the whole law of forfeiture, and discontinuance for alienation. But it would be a very extreme presumption to hold, even in defence of a meritorious title, against a tortious claim, that the defendant went through a ceremony of conveyance which has scarcely ever, if at all, been done in practice on this continent, and probably not for ages even in England. I find in the law books no instance of actual livery of seisin on this continent ; but history gives us one. When William Penn arrived in America with his patent as "proprietor and governor in his pocket," the key of the Fort at Newcastle was delivered to him ; with this he locked himself in and afterward let himself out. A turf with a twig upon it was then handed to him, and a porringer of river water ; and thus in ancient feudal form Delaware was transferred. I find this incident in the *Century Magazine*, March, 1883, p. 736. To infer from the defendant's possession that he had gone through this interesting ceremony, even in simpler form, would be an absurdity ; it has never even been suggested in our courts. Livery of seisin is, in fact, a very different thing from merely letting the grantee into possession. It was not originally an adjunct to a deed of any kind, but the deed, when it came to be introduced, was an adjunct to the more ancient mode of conveyance by mere livery of

seisin. Originally, all estates of freehold were passed by livery only, without deed. These were, usually at least, life estates only, and when estates of inheritance afterwards became prevalent, deeds became necessary, not to convey the land,—this was done by the livery,—but to define the nature and quantity of the estate conveyed, *e. g.*, whether it was a freehold for life, in fee simple or in tail. Such a deed we have in *2 Bl. Com.*, Appendix No. 1. It does not define the consideration which is only *quadam summa pecuniæ*, it uses the words of conveyance, *dedi concessi et confirmavi*, and the habendum is exactly like that in this deed, *hereditibus suis et suis assignatis*, with a warranty. It is in the past tense which is significant of something which had preceded it, some “giving and granting,” which is explained by the record endorsed, *viz.*, that on the same date as the deed, *plena et pacifica sesina*, was given to the grantee in presence of witnesses, *secundum tenorem et effectum cartæ infra scriptæ*, below written—shewing both by the past tense used in the deed and the deed being written below this record of livery of seisin, that the latter preceded the deed and was, in fact, the real conveyance. Such was the deed in use in the reign of Edward VI., *Anno Sexto*. I apprehend that with the feudal investiture of the land effected by the livery of seisin, the deed, as a conveyance of title, would have been waste paper, and that without the deed the livery would have conveyed a freehold; this I shall show presently. But first, I will refer to what is evidently the original of our common deed, which I find at length in *Jacob's Law Dictionary*, Title “Feoffment.” It contains, as the conveying words, “granted, bargained, sold, aliened, enfeoffed, released and confirmed,” and is almost precisely similar in its premises, *habendum*, and general form and structure to the deeds under consideration in *LeCain v. Wieland*, and in this cause, and contains our usual covenants of title, &c., only more diffuse. But there is one important difference; it contains, after the covenants, a power of attorney to a third party to enter into the premises and “take possession and seisin, and thereupon” the “like full and peaceable possession and seisin thereof * * unto the said C. D. or to his certain Attorney or Attorneys in that behalf, to give and deliver, to hold to him, the said C. D., and

his heirs," &c. This "attornment," as it is called in the books, was necessary, as although livery might be given or received by Attorney, the authority must be by deed. 4 *Cruise's Dig.*, chap. 4, sec. 14; 3 *B. & Ald.*, 156. And in no case was mere livery sufficient unless the possession was formally delivered by the feoffor to the feoffee. 4 *Cruise's Dig.*, chap. 4, sec. 5. I have not the date of this precedent, but that it was after the *Statute of Uses*, is evident from its phraseology.

We have adopted this modernised deed of feoffment, but without that which alone makes it a feoffment, the livery of seisin, endorsed on the old charter, and provided for by the attornment in the more recent deed; and this mongrel deed which is in use in this Province, in Ontario, and in New Brunswick, is in use also in all the United States of America. It is in form a deed of feoffment, but without the livery of seisin, a deed of bargain and sale without (necessarily) any consideration, and without the enrolment in the Court of Chancery, provided for in 27 H. 8, chap. 16, a deed of lease and release, without the lease, and a deed of confirmation without any previous estate to be confirmed, and a deed of grant without there being necessarily any incorporeal hereditaments to convey. In order to discover which of the several words of conveyance in this deed is the operative part in conveying title, I have looked in vain into the very able and exhaustive treatises on the Law of Real Estate, published in the United States by *Washburne* and *Hilliard*. It does not rest anywhere upon any legislative sanction, yet it has been constantly received without question by the Courts all over the continent as an adequate conveyance of title. Probably its stability and efficiency may be accounted for and predicated from the hint given us by *Blackstone*, Book 2, chap. 10, sec. 14, and chap. 11, sec. 4. In speaking of the conveyance by lease and release he says, "It was first invented by Sergeant Moore, soon after the Statute of Uses, and is far the most common of any, and therefore, not to be shaken, though very great lawyers, as particularly, Mr. Noy, have formerly doubted its validity." (See also 4 *Cruise's Dig.*, chap. 11, sec. 4.) It would enlarge this opinion, already too extended, beyond reasonable bounds, to pursue this subject further than to remark that, upon whatever grounds it is based, there has

always been a general consensus of the Courts upon the subject of the validity of the ordinary deeds, that in fact a "common law" has grown up on this continent upon this point which is likely to prevail in all the future. "It has been said," observed Lord ELLENBOROUGH, *communis error facit jus*; but I say, *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the ground-work and substratum of practice." *Broom's Maxims*, 139.

There are two cases of forfeiture by alienation to be found in the American reports, the *Commonwealth of Massachusetts et al. v. Welcome*, 5 Danes' Ab., 13, in which an estate was declared forfeited by alienation by the life tenant, and a subsequent case in Maine, cited in *1 Hilliard on Real Estate*, 101, (n) where the estate was forfeited by alienation of a tenant by curtesy; but both of these cases were followed by legislation to prevent the recurrence of a similar injustice, the legislation being similar to the statute of New Brunswick, which makes recorded deeds valid and effectual, and "of the same effect for the giving possession and seisin and making good the title and assurance of the land as deeds of feoffment, with livery of seisin, or deeds enrolled in any of the King's Courts of Record at Westminster, were or should be in Great Britain." *Penns. Stat.*, 1715. Similar statutes were passed in several, but not all of the other States, and in none have those cases been recognized as precedents. Yet *Washburne* says, (I., 110, n,) "But it is probably the case that unless the case of Dower or Curtesy forms an exception, a tenant for life does not, in any case, work a forfeiture by conveying in form a greater estate than he has, since only what estate he has passes by such deed. This is declared by statute to be the law in many of the states." And he says further that "in several other states it has been held that the English law of forfeiture for alienation has never obtained in this country." *Hilliard*, (I., 100,) observes, "It is said by one distinguished Commentator, (Kent,) that scarcely a direct decision upon the subject is to be found in our American books; and another is of the opinion that as the form and nature of American conveyances is that of a grant, which passes nothing more

than the grantor is entitled to, the doctrine of forfeiture is not in force, even independently of statute provisions, in the United States," and cites *4 Kent*, 83-4 and 106, and *5 Dane*, 11-13.

Perhaps the best evidence that the law in the whole of the British colonies on this continent is as stated in the last citation is the fact that in the United States and New Brunswick, and, as far as I am aware, in Jamaica and Antigua, where similar legislation has been had, as well as in those states and colonies, including this Province, where there has been no such legislation, no case can be shown, as I believe, in which the validity of a deed has been questioned merely for want of registry. Whatever may have been the effect of such legislation upon a recorded deed, it may fairly be said that if such legislation was necessary to supply the place of livery of seisin for any purpose, then no unrecorded deed ought ever to have been received in evidence in this Province to prove title. It has never been held that the *Statutes of Uses and Enrolment* are in force in this Province, and, under the principles affirmed by the Court of Chancery on appeal in the case of *Uniacke v. Dickson*, James R., 287, it may almost be affirmed that they are not, inasmuch as our legislature has not seen fit to re-enact them, or to provide the facilities for enrolment, without which they would be inoperative. In New Brunswick the Registry Act is held to supply that deficiency, but our statute makes no such provision. The only enactment we have is contained in one chapter of the *Revised Statutes*, "of the Registry of Deeds," &c., chap. 79, sec. 19, and is as follows:—"Deeds or mortgages of lands duly executed, but not recorded, shall be void against any subsequent purchaser or mortgagee, for valuable consideration, who shall first register his deed or mortgage of such lands." The words "feoffment" or "livery of seisin" do not, I believe, occur in our *Revised Statutes*, nor in any of our previous legislation, nor any other words in any way referring to the subject of the form or validity of any species of conveyance. Yet we are not so unhappy as to be entirely without judicial sanction for our ordinary deed, for it has been upheld without question in our Courts from the foundation of the colony. And, as to its legal efficacy, we have the emphatic words of

HALLIBURTON, C. J., in *Lessee of Cunard v. Irvine*, James R., 31. He says, referring to a dictum of STORY, J., "If the learned Judge meant to confine his opinion to the case of recorded deeds, I cannot concur with him. The deed was probably recorded * * * and certainly the recording of it gives additional publicity to it, but the only consequences attached by law to the non-recording of a deed, are that it becomes void as against subsequent purchasers." And again, p. 32, "I scarcely think that such a title as the plaintiff has set up in this case would be sufficient to put the defendant upon his defence in England. I incline to think, however, that it ought to be in this country. *Livery of seisin has never prevailed on this side of the Atlantic.* Actual seisin of wild lands has never been deemed necessary to entitle a party to convey them to another." It is evident from this case and *LeCain v. Wieland* (*ante* p. 71,) and, I think, every case that has ever been decided in this Province, that our mode of conveyance of real estate, which is the same as that which prevails in the United States, rests upon the same foundation and is equally secure and useful as that which governs all the real estate in that great kindred nation.

I cannot help thinking that the true solution of this question is to be found in the decisions of the Courts in several of the American States, that the English law of forfeiture by alienation is a part of the common law, which we, as colonists, did not bring with us when leaving the parent roof. So far from receiving it as part of our inheritance we have treated it most ignominiously. Almost everywhere it has been rejected in theory, and everywhere in practice; only in two instances has it prevailed in the Courts on this side of the Atlantic, and in both instances the Legislatures have taken immediate steps to prevent its recurrence. We brought with us the whole of the common law except such parts as are obviously inconsistent with the circumstances of the country. *Uniacke v. Dickson*, James Reps., 287. If the history of the doctrine on this continent is not sufficient to satisfy us that it has always been held by the legislature and almost invariably by the courts also, to be inconsistent with our circumstances, a brief reference to its history in England will show that it had become antiquated and fallen out of practice, even there

before we had any existence as a British colony. The conveyance by livery of seisin received its death-blow from the *Statutes of Uses*, 27 H. 8, ch. 10. Its sufficiency as a conveyance without deed was taken away by the *Statute of Frauds*, 29 Car. 2, ch. 3, and although it did not receive its *coup de grace* until the statutes 4 & 5 Vic., chap. 21, and 8 and 9 Vic., chap. 106, which last abolished forever the whole doctrine, yet the merest reference to the authorities cited by *Blackstone* and *Cruise*, and the fact that even the titles livery of seisin and forfeiture by alienation do not appear in our modern Digests, are sufficient to show that the whole doctrine was virtually exploded and gone entirely out of use long,—probably a century,—before the settlement of this Province. It is very significant upon this point, that the very first Act passed by our Provincial Legislature in 1838,—32 George II., chap. 1,—1 P. L., p. 1, was an act for confirming titles to land and quieting possessions, and the first section of that act is as follows:—
 “Be it enacted by the Governor, Council and Assembly, and by the authority of the same it is hereby enacted, That all persons claiming or deriving any right or title to any lands or tenements by virtue of any grants or deeds entered in the public registry of this Province, or by virtue of any last will and testament, shall have and enjoy such lands and tenements according to the tenor and effect of such grants or deeds registered, and of such last will and testament * * * *
 and that all possessions by virtue thereof shall be and are hereby confirmed, any want of legal form in such grants, deeds, or wills notwithstanding.”

No argument can be drawn from this enactment in favor of this exploded doctrine, in favor of registry as providing a constructive livery of seisin, not only because it has long since been repealed, but because it does not mention even the name of livery of seisin, as did the statute of New Brunswick on the same subject. I think this statute amounts to an absolute renunciation of the doctrine of conveyance by livery of seisin, without which, as I have already observed, a forfeiture cannot be sustained. The conclusions which I draw from the foregoing authorities are 1st, that forfeiture by alienation is a consequence of one, and only one species of conveyance, viz. a feoffment with livery of seisin. 2nd, that there is no form,

of conveyance in use in this Province that requires livery of seisin, or which imports, or includes livery of seisin. 3rd, the deed in this case, as in *LeCain v. Wieland*, though it uses the word "enfeoff" is not sustained by any evidence whatever that it was accompanied or followed by livery of seisin. I am, therefore, clearly of opinion that it did not work a forfeiture as alleged by the plaintiff, and that the nonsuit ought, on this ground, to be sustained. I am also of opinion that the common law doctrine of forfeiture by alienation never had any existence in this Province, as it was clearly unsuited to our circumstances and has never received any legislative or judicial sanction whatever, and that our inexpensive and eminently secure system of conveyancing, resting as it does on a single and simple form of conveyance, receives its legal sanction and authority from the fact that it has always, since the foundation of the colony, without any pretence of livery of seisin, been received in evidence and made the foundation of title by the Courts without any doubt or question. To disturb it by holding that it is dependent, in any sense, upon livery of seisin for its validity, would be to hold that there is not a legal title in the Province, as there is probably not one in relation to which the practice of livery of seisin has been used. Some of the authority to which I have referred on this subject are, *N. B. Revised Statutes*, chap. 112, sec. 10; *Wortman v. Ayles*, 1 Hannay's N. B. Reps., 63; *McLardy v. Flaherty*, 3 Kerr, N. B. Reps., 445; *Scribner v. McLachlan*, 1 Allen, N. B. Reps., 445; *Nolan v. Fox*, 15 U. C. C. P., 568; *McDonald v. Gillis*, 26 U. C., 458; *5 Dane's Ab.*, 11-13; *1 Cruise's Dig.*, chap. 1, secs. 20, 21, and chap. 2, sec. 7; *4 Cruise's Dig.*, chap. 4, secs. 5, 9, 14, 15, 42, 43; *Williams on Real Property*, 169, n. 170; and Washburne's and Hilliard's Treatises.

HUBLEY v. BOAK.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided December 18th, 1882.)

Right of counsel to be heard.—False imprisonment.—Arrest.

DEFENDANT ordered plaintiff off his wharf and sent for a policeman, who came and took the plaintiff to the lock-up where he placed him in a cell.

Held, That defendant had a right to have him removed from the wharf, and was not responsible for the subsequent arrest and imprisonment.

The appellant's junior counsel opened in support of the appeal, and the Court announced that they would decide after consultation whether it was necessary to call on the other side. The senior counsel then claimed a right to be heard in support of the appeal, but the Court refused to hear him.

This was an appeal from a judgment of James W. JOHNSTONE, Esquire, County Court Judge for District No. 1. The action was one for false imprisonment. Defendant, in addition to pleas in denial, pleaded the following pleas in justification:—

And for a third plea to said declaration, defendant says that at the time of the alleged trespass he was possessed of a wharf and premises, wherein the plaintiff was trespassing, making a noise and disturbance, and preventing the servants of the defendant from working, whereupon the defendant requested the plaintiff to cease from so doing, and to leave the said premises, which the plaintiff refused to do, and, thereupon, the defendant sent for a policeman and gave the plaintiff in charge, in order to remove him from said premises, and the said policeman removed him therefrom, doing no more than was necessary for that purpose, which are the alleged trespasses.

And for a fourth plea, etc., that plaintiff went to defendant's wharf and prevented defendant's servants from working, and created a disturbance thereon, and committed a breach of the peace, whereupon defendant required the plaintiff to leave the said wharf and premises, which plaintiff refused to do, and the defendant, in order to remove plaintiff from his said wharf, and prevent a further breach of the peace, sent for a policeman and gave the plaintiff into his custody, and plaintiff was, by said policeman, brought before Henry Pryor, Esquire, Stipendiary Magistrate for the County of Halifax, which are the alleged trespasses.

The plaintiff, at the trial, swore that when arrested he was standing on defendant's wharf, looking at men rolling fish into defendant's store. The defendant had previously ordered him off of the wharf, and had told him that if he did not go "he would get a policeman and put him off." The defendant sent for a policeman, who came and took the plaintiff to a lock-up, where he placed him in a cell. He was kept for an hour, or half an hour, in the cell, and then brought before a magistrate, who discharged him, the defendant failing to prosecute.

The learned County Court Judge gave judgment for defendant, from which plaintiff appealed.

P. C. Hill, Jr., (with whom was Tupper,) in support of appeal.—Imprisonment cannot be justified on the ground of unlawful entry into defendant's house and making great noise and disturbance, and refusing to depart. *Green v. Bartram*, 4 C. & P., 308; 8 *Moore*, 362. The defendant here admits giving plaintiff into the custody of a policeman. Defendant is responsible, under the facts in evidence, for the fact of the plaintiff being imprisoned. There is no plea setting up facts justifying an arrest. Cites 1 *G. & D.*, 668. The pleas in justification are not regular, and do not properly raise the defence of justification, as they do not aver that the breach of the peace was continuing at the time of the arrest. 4 *N. & M.*, 469; 5 *M. & G.*, 123. No one can arrest for a breach of the peace after it is over without a warrant. 6 *C. & P.*, 744; 2 *A. & E.*, N. S., 724. (WEATHERBE, J.—Whether there was an arrest or not, is a question of law, and no evidence was given of facts which would constitute an arrest in law. The defendant was justified in ordering the policeman to remove the plaintiff from the wharf, and was not responsible for the policeman taking plaintiff to a cell and before the magistrate.)

The COURT said they would decide after consultation, whether they would call upon the other side.

Tupper claimed the right to be heard in support of the appeal, but was refused.

WEATHERBE, J., (December 18th, 1882,) delivered judgment, dismissing the appeal with costs.

STARR v. HEALES.

Before WEATHERS, RIGHT, and THOMPSON, J J,

(Decided December 18th, 1882.)

By-law must be set out in conviction.—Grounds in rule.

DEFENDANT was convicted of allowing his cattle to go at large in the township of Cornwallis.

Held, That the conviction was bad in that it did not set out the by-law or ordinance of the Sessions creating the offence; and that the objection was covered by the ground taken in the rule, that the conviction did not show any offence for which it could lawfully be made.

Defendant was summoned to appear before two Justices of the Peace of the County of Kings, at the suit of plaintiff, to answer a charge of allowing his cattle to go at large in the Township of Cornwallis, contrary to the provisions of *Revised Statutes*, (3rd series,) chapter 147. After trial a conviction was entered up in the form following:—

The within-named Charles Heales, having been duly summoned, was this day convicted of allowing the cattle of the said Charles Heales to go at large in the Township of Cornwallis, in the said county, within six months from the issuing of the writ herein, upon the oaths of Joseph Starr and others, and was thereupon fined one dollar with costs, amounting in all to the sum of sixteen dollars and seventy-eight cents, to be paid forthwith.

Witness our hands this twenty-fourth day of October, A. D. 1881.

(Sgd.) JOHN H. DENNISON, J. P.

(Sgd.) EDWD. J. ROSS, J. P.

The conviction having been brought up to the Supreme Court by *certiorari*, a rule *nisi* was obtained to set it aside, upon the following grounds:—

The said conviction is bad and insufficient on its face. It is not in the form required by the said chapter 147 in said conviction mentioned.

The said conviction does not show or set forth any offence for which the same could be lawfully made.

That allowing cattle to go at large is not an offence within or under said chapter 147, nor an offence at all; and that the said Justices of the Peace had no power or authority to make the said conviction.

The conviction should show the names of witnesses called at the trial.

The said Joseph Starr is not the proper party to sue for said penalty.

The said conviction is insufficient and defective, and upon all the grounds and each and every of them disclosed in said affidavits, certiorari and returns, and exhibits annexed to each respectively, and appearing upon the face of the said summons and conviction; and because the said summons is defective and insufficient, and does not disclose an offence, and is open to the objection herein specified in reference to the conviction.

Borden, in support of rule.—There is nothing in chapter 147, *Revised Statutes*, which makes it unlawful for cattle to go at large. In determining the point whether it is unlawful for cattle to go at large, the Court cannot go outside the chapter referred to in the charge. The by-law against cattle going at large should have been referred to in the summons and conviction. (RIGBY, J.—I do not see that there was any authority under the statute to make a by-law against cattle going at large. THOMPSON, J.—If the by-law makes allowing cattle to go at large an offence, I don't think it is necessary to say in the summons under what regulation the offence is to be brought.) I think something should appear in the conviction to show an offence. Without setting out the regulation, it does not appear that there is an offence at all. The only power is to make a by-law for the prevention of trespasses. It is not sufficient to say that the offence was against the provisions of a certain chapter. Some section should be referred to. (WEATHERBE, J.—You mean that you must particularize the offence.) Yes. I cite on that point *Paley on Summary Convictions*, 208-211. The conviction is not in the form required by the statute. *Revised Statutes*, (3rd Series,) p. 623. It is bad as showing that several witnesses were examined, and not setting out their names. If the form in the statute is followed, it must be followed strictly. In the Dominion Statutes, in reference to summary convictions, it has been found necessary to provide that the convictions shall not be bad for want of form. There is no such provision in this act. The summons does not state the time at which

the offence was committed, as required by the statute. The forms of proceedings in sections 30 and 31 do not apply to section 12, but apply to petty trespasses and petty assaults.

Henry, Q. C., contra.—It is not the by-law itself which is violated, but the chapter of the act. (RIGBY, J.—It would not do to charge a party with an offence against the British North America Act, without particularizing the offence.) The by-law becomes a part of the Act when made, and is merged in it. If I am wrong in this, I admit that the conviction is bad. It is not necessary to plead a by-law. *Tucker v. The Queen*, cited in *Grant on Corporations*, p. 80; *Dillon on Municipal Corporations*, 345; *Grant on Corporations*, 304; 1 T. R., 124, 125. If the by-law is merged in the act, and the offence consequently is against the act, it is sufficiently set out. The case, *Newman v. Hardwick*, 8 A. & E., 124, illustrates the point that a conviction need not set out what is matter of evidence. At that time it was necessary to set out the evidence; now it is not. The by-law here is really evidence. The conviction contains the name of one witness and the words "and others." It does not appear that it was material. The words in the form in reference to names are not part of it but are a mere suggestion. The omission to specify the time was waived by the trial. The object of the summons was fulfilled by the appearance of the defendant. *Paley on Convictions*, 94. (THOMPSON, J.—If your contention in regard to the summons is correct, I think the offence is sufficiently set out in the conviction.) An affidavit was made for an appeal, which was not perfected. The defence on technical grounds was waived by taking steps toward an appeal. *Reg. v. Long*, 1 Q. B., 740. It is too late to apply for a certiorari after an apparent acquiescence in the jurisdiction of the Court.

Borden in reply.—If the conviction could be sustained for violating a by-law of the sessions, it cannot be sustained for violating a by-law made by the municipality. (RIGBY, J.—It was made by the Sessions.) It was re-enacted by the municipality. The regulation of the Sessions was not in evidence. (WEATHERBE, J.—We cannot look to the evidence.) The conviction in *Newman v. Hardwick* was nearly identical with

that here. It was not a conviction at common law, but under a statute.

RIGBY, J., (December 18th, 1882,) delivered judgment as follows :—

We are all of opinion that the conviction on the face of it was bad, because it contained no reference to the regulation of the Sessions, which they had power to make under chapter 147, *Revised Statutes*. The case of *Newman v. Hardwick*, 8 Ad. & El., 124, is in point, and there are Canadian cases to the same effect, which will be found in *Robinson & Joseph's Digest*, p. 1979. In *Newman v. Hardwick* the conviction was held bad because there was no averment that the Sessions had made an order under the statute constituting the offence for which the defendant was convicted. In this case there was an absence of a similar averment. Mr. Henry contended that there was no ground in the rule to cover the objection, but we think that it was covered by the ground that the conviction does not show an offence for which a conviction could lawfully be made. There was also a contention that because the defendant appeared at the trial there was a waiver. By the appearance he may have waived the informality in the summons, but could not have waived the irregularity in the conviction, which was a subsequent matter. The conviction upon its face must show an offence within the law. For these reasons we think the rule must be made absolute with costs. We cannot go into the merits, but, if it is a fact that the defendant has suffered his cattle to go at large, we regret that he should escape in consequence of a mere technicality, and that the plaintiff should have to pay costs.

WEATHERBE, J.—I am obliged to concur in the judgment just delivered, though I do so with reluctance, because, as far as we can see, the conviction is bad on merely technical grounds.

THOMPSON, J.—I concur in the judgment. I am satisfied that the municipality had power to make the regulation under which the proceedings were taken. A trial was had and a fine imposed, which, in view of the offence being a great

public nuisance, was a moderate one. But, on the ground that the by-law should have been set out in the conviction, I think the conviction cannot be sustained.

OVERSEERS OF POOR, BRIDGEWATER, v. OVERSEERS OF POOR, PORT MEDWAY.

Before WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided December 18th, 1882.)

Poor law.—Expenses incurred previous to removal.

A PAUPER having a settlement in defendants' district was seized with fever in plaintiffs' district. Plaintiffs gave her relief, gave notice to defendants and had the pauper removed as soon as it could properly be done. They then brought action for the expenditure incurred previous to the removal.

Held, That the Statute was not sufficiently clear and unambiguous to impose on defendants the expense of sustaining the pauper previous to removal.

This was an appeal from a decision of W. B. DESBRISAY, Esquire, Judge of the County Court for District No. 2. Plaintiffs, who were Overseers of the Poor for Bridgewater Poor District, sued the defendants, who were Overseers for the Poor District of Port Medway, No. 8, to recover expenditures made on account of a pauper, who had a settlement in defendants' district, but was seized with a malignant fever while in the district of which plaintiffs were overseers. The decision appealed from was in favor of the plaintiffs.

Henry, Q. C., in support of appeal.—The Judge below was disqualified, being a rate-payer in one of the contending districts. *Tupper v. Murphy*, 3 R. & C., 173; *Dimes v. Grand Junction Canal Co.*, 3 H. & C., 759-785. There is provision made for the judge of another district to act. The judge improperly received the *ex parte* examination of the pauper as evidence for the purpose of showing her place of settlement.

McCoy, Q. C., was called upon on the point of interest of the judge.—There is no sufficient evidence that the judge was assessed in the district, or that the district in which he resides is the one bringing the action. *1 Taylor on Evidence*, 372, section 409.

Boak, (with *Henry*.) in support of appeal.—The judge improperly admitted the declaration of the pauper to show her place of residence. *Rex v. Ferry*, 2 East., 54; *Fisher's Digest*, 6832. No implied promise is raised from one township to another for money paid for the relief of the poor. No notice was given as required. If anything, the plaintiffs could only recover the expense of removal.

McCoy, Q. C., contra.—The object of the statute, (*Revised Statutes*, 4th Series, chapter 33,) is the indemnification of the district by which expense for the support of paupers belonging to other districts is incurred. Cites section 18. The place chargeable is not necessarily the place of settlement. The district in which the pauper has a settlement must reimburse the district in which the expense is incurred; this means the expense up to the time of notice, and not the expense of the removal, which cannot be known before the giving of the notice. *11 Pickering*, 459; *15 Mass.*, 290. The word "expenses incurred" means all the necessary expenses incurred in and about the pauper. The district is bound to give him support, if necessary. He cannot be allowed to starve. (*RIGBY, J.*—Section 8 does not say they are to pay the expenses, section 9 only says they are to pay the expenses of the removal.) They may never incur any expenses under the ninth section, because the place of settlement may come and take the pauper away.

Henry, Q. C., in reply.—Sections 8, 9 and 10 of *Revised Statutes*, chapter 33, make it imperative to take evidence of others as well as the declaration of the pauper. Where the declaration cannot be taken it is imperative, as the alternative, to take evidence. It appears here that the pauper was capable of making the declaration, though she was incapable of being removed. We have shown this affirmatively, and it has not been negatived. The time of giving the notice is dependent upon the time when the declaration could be obtained. It should be given at the earliest time available. There was no sufficient evidence of the pauper's husband having obtained a settlement at Port Medway. (*RIGBY, J.*—Should you not have appealed from the order? Are you not precluded by not having done so?) Perhaps so.

THOMPSON, J., (December 18th, 1882,) delivered the judgment of the Court :—

A pauper, having a settlement in the defendants' district, was seized with a malignant fever in plaintiffs' district. Plaintiffs gave her relief, gave notice to defendants and, as soon as it could properly be done, caused her to be removed to her place of settlement. The action was brought for the expenditure incurred before the removal could be effected. We disposed of all minor points at the argument, and reserved our opinion on the main question,—that of the liability of defendants to be sued for such expenditure. In England, where, as here, the liability is statutory, the statutes on the subject enable, by express words, the overseers giving temporary relief before removal to recover, under the removal process, such expenditure. In this Province, although the early statute did the same, the present statute only enables such overseers to collect under the removal proceedings, the "expenses incurred," without defining whether these expenses are the expenses of sustaining the pauper, or only those connected with the proceedings preliminary to removal. We think that more clear and unambiguous words would be necessary to impose the burden sought to be established. Another difficulty meets the plaintiffs, however. Even in England, where the enactments are so explicit, it has been held, (for instance in the case of *Atkins et al. v. Banwell et al.* 2 East, 504,) that the general liability of a district to support its own poor will not enable an action to be maintained against the overseers of that district by persons who may have given temporary relief—and were bound, as plaintiffs were, to give such temporary relieve, in the absence of an express promise. The judgment of the County Court will, therefore, be reversed, and judgment will be entered for defendants with costs.

JOHNSTON *v.* McLEAN.

Before McDONALD, C. J., and WEATHERBE, and RIGBY, J J.

(Decided December 22nd, 1882.)

Appeal Dismissed for Non-payment of Costs under rule to enter.

APPEAL dismissed, where appellant having neglected to enter the appeal in time, obtained a rule to enter the cause on payment of costs, which appellant failed to pay.

In this case an appeal was taken July, 1881, but was not entered in time. Weeks obtained a rule to enter the cause on payment of costs. The costs were taxed but not paid, and the cause was entered for the present term and passed.

Meagher, Q. C., now, (December 22nd, 1882,) moved to dismiss the appeal with costs.

Pearson, contra.

Rule absolute.

THE QUEEN *v.* ROBIN ET AL.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided January 11th, 1883.)

Forfeiture for Non-performance of Conditions of Grant.—Evidence.

THE Crown sought to forfeit two grants for non-performance of conditions as to improvement, &c., but none of the evidence on which the Crown relied went further back than fifty years, while the grants were ninety years old.

Held, That the evidence was not sufficient to forfeit the grants.

This was a proceeding instituted on behalf of the Crown under *Revised Statutes*, chapter 106, to reinvest in the Crown certain lands in the Island of Cape Breton, which were granted to Philip Robin, and others, by two conveyances, dated respectively September 14th, 1790, and April 2nd, 1792. The conditions upon which the grants were alleged to have been made, and for non-performance of which the forfeitures were sought, were set out as follows :—

That the grantees, their heirs or assigns, should, within three years from the date of the grant, for every fifty acres of the land accounted plantable, clear and work three acres at

the least, or clear and drain three acres of swampy or sunken ground, or drain three acres of marsh, and for every fifty acres accounted barren, should put and keep on the land, within three years from the date of the grant, three neat cattle, and keep that number on till three acres out of fifty granted should be cleared and improved; and if no part of the land should be fit for present cultivation, should erect a habitable dwelling house thereon within three years from the date of the grant, and put on the land three neat cattle for every fifty acres contained in the grant. But in case of the land being unfit for cultivation, it should be deemed sufficient to employ, within a reasonable time from the date of the grant, and to continue employing for the three years next ensuing, one able hand for every one hundred acres in cutting wood, clearing land or digging stone quarries; and in case of failure to fulfil the said several conditions, the grants were, and each of them was to be void, and the lands to revert to the Crown, as by the said grants, and each of them, reference being thereunto had, will more fully and at large appear.

The grants also contained provisions by which they were to become void for failure to pay the rent reserved in case no distress could be found, for failure to duly register the grants, or if the lands granted should at any time come into the possession of persons who should neglect, within twelve months, to take the oath of allegiance.

The cause was tried before SMITH, J., at Port Hood, C. B., June 23rd., 1881, with a jury, when a verdict was found for the defendants on the first, and for the Crown on the second grant. The cause now came up on a rule to set aside the verdict for plaintiff. None of the evidence adduced on the part of the Crown at the trial to show non-compliance with the conditions of the grants, went back further than fifty years.

Meagher, Q. C., in support of rule.—The only conditions on failure to perform which the grant was to become void were, (1) failure to pay rent for a specified time, there being no distress available; and, (2) conveyance to a party who failed to take the oath of allegiance within twelve months. There was no evidence of failure to perform either of these conditions. There was nothing in the grant to show that it

was to become void on failure to perform the other conditions in reference to working, keeping cattle, etc.

Meagher, Q. C., was stopped.

Borden, (with whom was *Graham, Q. C.*), contra.—The judge instructed the jury that it was incumbent upon the Crown to prove clearly the non-fulfilment of the conditions relied on. (*WEATHERBE, J.*—All trace of everything the grantees were required to do might be lost in two or three years. You must show that the land was in a certain condition ninety years ago.) We show that fifty years ago the land was in such a condition that the conditions of the grant could not have been fulfilled. (*WEATHERBE, J.*—I have no hesitation in saying that you could never forfeit the grant under the evidence, and I am astonished that such a case should have been brought here. *JAMES, J.*, (to Mr. Borden).—Have you anything else to say?) Not if your Lordships think we must go back ninety years.

SMITH, J.—The Court are of opinion that the rule must be made absolute.

Rule accordingly.

CARD v. WEEKS.

Before McDONALD, C. J., and RIGBY, and THOMPSON, J. J.

(Decided January 13th, 1883.)

Security for Costs.—Discretion.—Appeal.

AN appeal was taken from an order of a County Court Judge discharging an order *nisi* for security for costs, where it was shown that the plaintiff, although resident out of the Province, was a native and a British subject and had considerable real and personal estate within the jurisdiction, and there was some evidence that she intended to return.

Held, That the granting or refusal of the stay of proceedings by the County Court Judge was a matter of discretion, and that the discretion had been rightly exercised by the Judge.

This was an appeal from an order granted by G. A. BLANCHARD, Esquire, Judge of the County Court for District No. 4, discharging an order *nisi* for security for costs obtained upon an affidavit that the plaintiff, at the commencement of the suit, and at the time of the making of the affidavit, was

residing abroad in the United States of America, out of the jurisdiction of the Court, and that, except for a short period, she had so resided for the past six or seven years. The affidavit in reply and upon which the order appealed from was granted, was as follows:—

I, Isaac Carver, of Windsor, in the County of Hants, Esquire, make oath and say as follows:

1st. I say that I am well acquainted with Annette Card, the plaintiff herein, and have a personal knowledge of her circumstances, and of her property and business in the Province of Nova Scotia, and have a personal knowledge of the matter hereinafter deposed to.

2nd. I say that the plaintiff is possessed of real estate in the Town of Windsor, in the County of Hants, and Province of Nova Scotia, of the value of about four thousand dollars, from which she receives the rents and profits. That she also owns one undivided fifth part or share of a lot of land in the Township of Windsor, in said County of Hants, of the value of about five hundred dollars. She is also entitled to and has one-third of the sum of eighteen hundred dollars secured to her by mortgage of real estate in said County of Hants. And besides other personal property possessed by her in said Town of Windsor, she has upwards of four hundred dollars invested in the Savings' Bank in said town on interest, and all which said property is unincumbered, and it is available to pay any claim which may be established against her.

3rd. I say that the plaintiff is a British subject, and is a native of the Province of Nova Scotia, where she resided until the year one thousand eight hundred and sixty-nine, or thereabouts, and I believe that she intends shortly to return to this Province, to permanently remain here.

Pearson, in support of appeal.—It is shown that the plaintiff is permanently residing out of the Province. The fact that a person shown to be permanently residing out of the Province, has real estate within it, is no answer to the application for security for costs. Even if the fact of her owning real property would be an answer, the affidavit is not sufficient. *Archbold's Practice*, 1416; *Fisher's Digest*, 2032. The property might be held as trustee, or be subject to a conveyance already made.

Borden, contra, cited *Lush's Practice*, 930; *Fisher's Dig.*, 2032; *Robinson & Joseph's Dig.*, 790; *Day's Common Law Practice*, 420.

Henry, Q. C., in reply, cited *Tidd's Practice*, 579; 2 *H. Blackstone*, 118.

THOMPSON, J., (January, 13th, 1883,) delivered the judgment of the Court :—

To succeed in his appeal the appellant should have shown that by some positive rule of law or of practice the Court below was bound to stay the plaintiff's proceedings until she should give security for costs, although she is a native of the Province, has real estate, mortgages and moneys in bank within the Province, and although there is some evidence that she intends to return. In our opinion he has not done so.

1st. Such matters are in the discretion of the Court. See *McCulloch v. Robinson*, 2 B. & P., N. R., 352, (a case peculiarly binding on us as settling or declaring the practice of the Superior Courts of Common Law in England, prior to the first year of the reign of William IV.) Before we could sustain the appeal, it must be made manifest to us that the judge could not, with propriety, decide, as he did in the exercise of discretion.

2nd. It appears to us that under the circumstances appearing in the documents submitted to us, the judgment appealed from was a fair and proper exercise of the Judge's discretion.

3rd. Some of the authorities cited at the argument indicate that the answer which the plaintiff made to the application for a stay of proceedings, is a complete legal answer, and not merely, as it is sufficient to treat it here, a ground for the favorable exercise of discretion. The appeal must therefore be dismissed.

The question of costs was reserved for further consideration, but, on a subsequent day THOMPSON, J., said they would follow the rule, which was therefore dismissed with costs.

RODGERS v. JONES.

Before McDONALD, C. J., JAMES, and WEATHERBE, J J.

(Decided January 15th, 1883.)

Deviation.

A CARGO of fish was insured at and from Eel Brook to Halifax. The vessel after partly loading at Eel Brook proceeded to Tusket Wedge, which was admittedly outside of Eel Brook, and to Morris Island, which was seven miles therefrom, and where she took in supplies. There was no evidence to show a usage that Morris Island was considered the same as Eel Brook.

Held, That there was a deviation.

This was an action on a policy of insurance on a quantity of fish on a voyage at and from Eel Brook, in the County of Yarmouth, to Halifax, beginning the adventure from and immediately following the loading thereof. The evidence showed that the vessel, after leaving Eel Brook, proceeded to Tusket Wedge and thence to Morris Island, for wood and water. The principal defence raised by the pleas was deviation. The cause was tried at Halifax, November Sittings, 1881, before JAMES, J., when a verdict was found for plaintiff for the full amount claimed. A rule was taken to set the verdict aside.

G. Ritchie, in support of rule.—A policy at and from a particular place will not cover another place in the same district. 2 *Taunt.*, 403; *Payne v. Hutchinson*, *ib.*, 405 n.; 1 *Oldright*, 259. Evidence of usage must show that it is recognized by both parties to the contract. As to seaworthiness cites *L. R.*, 10 C. P., 1.

Tupper, *contra* —The cases cited go on the meaning of the words, “port of loading,” and not on any question as to the name of the place. Cites 3 *Camp.*, 199. In this case the policy was “at and from the ships loading port or ports at Amelia Island, and the ship loaded at Tiger Island. It was held that “Amelia Island” might designate a district in which “Tiger Island” was included. See also 3 *Camp.*, 15. In this case the Gulf of Finland was held to be in the Baltic. (WEATHERBE, J.—Your evidence showed that you had left Eel Brook.) We had left the place called Eel Brook, but it

is all one district clearly. There is only one port of clearance. See also *10 Camp.*, 505. As to the right to put into ports, see *1 Price*, 195. The captain has a discretion, and if he exercises it *bona fide*, it is sufficient to protect him. *Ibid.* See also *Desy's Shipping and Admiralty*, § 146. On November 12th the vessel was not at the port of Eel Brook, which the appellants contend is the place referred to in the policy.

Ritchie, Q. C.—A port or place is strictly construed except where varied by a usage shown to be known to both parties. As to deviation cites *8 Am. Rep.*, 571 ; *9 Johns.*, 192 ; *L. R.*, 4 Q. B., 523 ; *3 Camp.*, 503 ; *2 Parsons*, 49 and 50 ; *2 Taunt.*, 416 ; *5 B. & Ald.*, 651. The vessel was not seaworthy when she left on her voyage, *10 C. P.*, 1. There is no evidence of a usage to go into port at night. The onus is on the insured to show that the goods were on board and were lost. The evidence shows that there was no hole in the vessel. There is no proof that anything was lost. The cargo got on shore and stored is shown to be same as that shipped.

MCDONALD, C. J.—I think we are all agreed that we need not trouble you any further. The verdict cannot be sustained. My judgment is based on the question of deviation. The goods were laden on board the schooner at Eel Brook. I do not think it necessary to discuss the question whether Morris Island and Eel Brook are in the same port, inasmuch as if the policy attached at Eel Brook, then the vessel went to Tuskett Wedge, which is admittedly outside of Eel Brook, and is a very different place from either Morris Island or Eel Brook, and there completed her loading and then sailed for Morris Island for the purpose of taking in supplies and fitting out for the voyage. I think that a deviation is shewn which is unexplained by any evidence, and which renders the policy void. With respect to the character of the goods shipped, had the case turned on that point, I should have been obliged to accede to the finding of the jury.

WEATHERBE, J.—If the law were not very clear, I would prefer time to consider, but I have no doubt the policy attached, and the risk commenced at Eel Brook. The question therefore for us to decide is, whether Morris Island, which is

98 ARCHBOLD v. MERCHANTS' MARINE INS. CO.

seven miles from Eel Brook, is to be considered the same as Eel Brook. That is a question of usage, and there is no evidence to show that there is any such usage.

JAMES, J., concurred.

ARCHBOLD v. THE MERCHANTS' MARINE
INSURANCE COMPANY.

Before SMITH, JAMES, and THOMPSON, J. J.

(Decided January 15th, 1883.)



Insurance of mortgagee's interest.—Authority from owner.—Trust for owner as to surplus.

PLAINTIFF, being the mortgagee of a vessel, caused insurance to be effected to the sum of \$5000 in defendants' office in addition to \$5000 insured in the Anchor Marine Insurance Company. The amount due to the mortgagee was \$5306, in addition to which he had advanced for payment of premiums \$522, making in all \$5828. Plaintiff had received from the sale of the vessel \$1207 and from the Anchor Marine Insurance Company \$4493—in all \$5700, leaving a balance of \$128. The verdict was for \$1325, and plaintiff claimed to retain it as trustee for the owner. The policy was expressed to be for "E. P. Archbold on account of himself." The only interest he set up in his affidavit of claim was as mortgagee, and the only authority he proved was that contained in his statement; "The owner authorized me to insure further for my own protection."

Held, That there must be a new trial unless the parties should consent to reduce the verdict to \$128.

Plaintiff, who was mortgagee of a vessel, caused her to be insured on a time policy with the defendant company. To an action on the policy, defendants pleaded that they did not make the policy, that no proof of loss was made or presented as required, that plaintiff misrepresented a fact material to be known to the defendants, representing that he was owner, whereas he was not, and, lastly, that the loss was covered by prior insurance. The policy contained a condition to the following effect:—Provided always, and it is hereby further agreed, if the said insured shall have made any other insurance upon the premises aforesaid, prior in date to this policy, then the said company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured; and the said company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated.

The cause was tried before McDONALD, J., in November, 1881. A verdict was found in favor of plaintiff, and a rule was taken to set the same aside.

Ritchie, Q. C., in support of rule.—This being a mortgage interest, there must be a total loss in order to recover. The vessel is not insured, but only the security. There must be notice of abandonment. *3 C. P. D.*, 257, is the leading case on the subject. No effort was made to get her off; she went ashore on a sandy beach. There is no survey proved. (*Henry, Q. C.*—There was a survey.) It is not proved. (*Henry, Q. C.*—We do not rely on proof of anything contained in the survey, but the statement as to the survey is evidence of the grounds upon which the captain acted. We can look at the surveys, not for the purpose of proving what is stated in them to be facts, but to show that the captain acted upon the recommendations contained in them.) The only evidence is in the answer to the sixteenth interrogatory, as follows:—

“I have looked at the consul’s copy of the survey of the vessel *T. C. Jones*, made by the said John Robertson and James C. Mills; I can identify the same as being the one made by the said John Robertson and James C. Mills on the sixteenth of October, one thousand eight hundred and seventy-nine; I can also identify the signatures of the said John Robertson and James C. Mills, having been present on the sixteenth day of October, one thousand eight hundred and seventy-nine, and seen each of them sign the said survey.”

The only evidence there is is of what appeared on a copy. The vessel was not a total wreck and was worth the whole amount of his security. It was his own fault that he did not get that. He had no authority to include premiums in his claim. He was entitled to \$5,000 and interest. He received from the Anchor Marine \$4,493, and the net proceeds of the vessel were \$1207, to which plaintiff was entitled. (*Henry, Q. C.*—We claim for premiums and say that the net proceeds should be divided among the other underwriters. Our claim is as follows:—Mortgage \$5,000, interest \$306.40; premiums \$522; in all \$5,828.40, less \$44.93 received from the Anchor Marine, leaving \$1,335.40, which is more than the net proceeds of the

vessel; assuming that we were to get them all, which we are not entitled to.) The plaintiff is not entitled to charge for premiums. The most that the evidence shows is that the owner promised to pay him for the premiums. He could not add it to the mortgage, or have a lien for it. There was misrepresentation here that avoided the policy. 1 *T. R.*, 12. He represented that he was owner.

Henry, Q. C., contra.—In fire policies it is important that the nature of the interest should be disclosed, whether as owner or mortgagee. Here it is of no consequence. And even if there was a misrepresentation, the question whether it is material or not, is one for the jury, which the Judge, acting as a juror, has found for us. There is no satisfactory evidence that would compel a jury to find that the representation was material. *Arnould*, 530. The Court will not assume that there was additional risk on account of double insurance, as that would involve a presumption of fraud. Mr. Twining, who actually made the application for insurance, was the paid agent of the company. He acted as an insurance broker, and his statement as to the interest of the insured does not bind the plaintiff. The policy says nothing as to the nature of his interest, and, although it is competent to give evidence of oral representations, where there is a written application, yet where the oral evidence relates to a representation which, it is contended, is material, its absence from the slip goes far to indicate its immateriality. The premiums must be held to be covered by the policy. The authority cited to the contrary is that there is no insurance of the premium without a contract. 1 *Parsons on Marine Insurance*, 227; 2 *Phillips on Insurance*, p. 45. An unpaid vendor has no lien, and yet has an insurable interest. (THOMPSON, J. —There are two cases in our own Court, *Outram v. Smith* and *Pugh v. Wyld*, against you on that point.) 21 *U. C., C. P.*, 291 is a case in point. Archbold's evidence shows an agreement between himself and the owner of the vessel, "the owner authorized me to insure further for my own protection." The premium would be lost by the person who has ultimately to pay it. The case cited from 21 *U. C., C. P.*, shows that the mortgagee could insure his own interest and that of the owner, and recover as trustee for the owner.

Ritchie, Q. C.—The premium is at most a debt. *11 C. B.*, 51. It would be otherwise if it was included in the mortgage. It all turns on the question whether there is a lien for the amount. Where the owner of goods insures, adding premiums, it is in the way of adding them to the price of the goods. The goods have become worth that much more at the port of delivery. *1 Parsons on Insurance*, 408, 413, as to the question of materiality. If the representation is made in reply to a specific question, as here, the question of materiality is excluded. It is not presumed that they would ask any question from idle curiosity. In the Canadian case the declaration sets out all the particulars of the claim. It is different from this, where the plaintiff sues for himself.

THOMPSON, J., (January 13th, 1883,) delivered the judgment of the Court:—

The plaintiff was mortgagee of a vessel called the *T. C. Jones*, on which he caused insurance to be effected with the defendants for \$5,000, the vessel being already insured by the owners for \$5,000 in the Anchor Marine Insurance Company. Only two questions are submitted for our decision. We are to treat the vessel as lost on the coast of Spain, by the perils insured against, during the currency of both policies, but defendants allege that the plaintiff has already been fully paid the amount of his insured interest by the sale of the vessel's materials and by the Anchor Marine Insurance Company, under the policy of that company; and they allege that, however that may be, they should be exonerated from liability, because the plaintiff's agent, in effecting insurance with their agent, represented that plaintiff was owner of the *T. C. Jones*, whereas he was only mortgagee. As regards the first question, it is admitted that plaintiff has received, on account of the amounts due under his mortgage, from the proceeds of the vessel, \$1,207, and from the Anchor Marine Insurance Company, under the former policy, \$4,493—\$5,700; also that there was due him, for principal and interest, \$5,306, and for premiums of insurance which he had paid from time to time, \$522—\$5,828. Under these circumstances the plaintiff should only have recovered \$128, and a proportionate part of the premium on this policy, even if all

the questions in the case were resolved in his favor, unless, as claimed by his counsel, he is to be considered a trustee for the owner, as respects any surplus which may exist, after the satisfaction of the mortgage. The defendants, however, insist that the plaintiff should not be allowed to add to the amount due on his security, any part of the premiums of insurance, and if they are right in this contention he has been overpaid. The verdict was for \$1,325.

We have first to investigate the plaintiff's right, in computing the amount which he can claim from the defendants, as the value of the interest insured. Of the \$522 which he paid for premiums, only \$120 was paid as the premium on this policy, the balance having been expended in keeping his mortgage insured, by policies which had run out before the loss. The plaintiff says in his evidence: "the owner authorized me to insure" * * "for my own protection. Of course no such authority was necessary to enable the plaintiff to insure—the owner, doubtless, meant to do more than confer an authority to do that which could be done without his consent,—it seems reasonable to assume, in plaintiff's favor, that the owner consented to become liable for the premiums which the plaintiff should pay in effecting such insurance. If so, the plaintiff has a remedy against the owner for such premiums; but, can he add them to his mortgage security and assert that that security, in respect of which the defendant's policy was to indemnify him, was increased in amount by the premiums which he had paid from time to time? In *Dobson v. Land*, 8 Hare, 216, it was decided that a mortgagee cannot add to his mortgage claims the premiums of insurance which he has paid, unless the mortgagor has contracted to insure; and in *Brooke v. Stone*, 34 L. J. Chan., 251, it was held that, although a mortgagor has covenanted to insure, and has neglected to do so, and the mortgagee has insured, the latter cannot add the premiums to the mortgage debt, unless there is an express contract authorizing him to do so, as against a subsequent incumbrancer. The decision in the latter case seems to have proceeded from a jealous regard for the interests of the second mortgagee, and it might be inferred from these two cases that as between the mortgagee and owner—and the underwriter can hardly claim to be in any more advantageous

position than the owner in paring down the amount due on the security,—the premiums can be added to the mortgage debt if there has been a contract to insure, or to pay the premiums of insurance. We have a further guide, however, by the subsequent decision of the same case of *Dobson v. Land*, as reported in 4 *DeGex & Smale*, 575. After the decision in 8 *Hare*, 216, which was on the abstract question of law, the master reported that the mortgagor had contracted to insure and covenanted that the mortgagee might insure, but there was no agreement or covenant that the insurance premiums paid by the mortgagee might be added to the mortgage debt. It will be observed that the absence of such a stipulation as this last was the reason why, in *Brooke v. Stone*, the premiums could not be charged as against the second mortgagee, but it was held in *Dobson v. Land*, 4 *DeGex & Smale*, 575, that the mortgagee might add them to his debt in consequence of the covenant to insure, and the covenant that the mortgagee might insure. In *Brooke v. Stone* there was no attempt to question or depart from the authority of this second decision in *Dobson v. Land*, which was cited at the argument, and this is another reason for believing that the decision in *Brooke v. Stone* was based on the rights of the second incumbrancer. See also *Fowley v. Palmer*, 5 Gray, 549. As regards the premium which the plaintiff paid for the insurance in question, in this suit, even though he could not add it to his mortgage debt, he had a right to insure it as well as his mortgage debt, on the general principle that the policy is designed to give him a complete indemnity—to put him in the position which he occupied at the commencement of the risk. “The worth of the thing insured, to its owner, at the outset of the risk, with the expenses of the insurance, is in all open policies, its estimated value for the purposes of the insurance.” *Arnould*, 281, 283, 304, and 2 *Phillips*, p. 45, sec. 1244. The allowance of the premiums will bring the plaintiff's claim, as mortgagee, up to \$5,828, while he has recovered \$5,700, so that the verdict must be set aside or reduced, unless the plaintiff be allowed to hold it as trustee for the owner. Whether a mortgagee has insured for his own benefit only, or for that of the mortgagor as well, and whether he has insured the vessel, or only his security, are, doubtless, if there be

evidence on such points, questions of fact for the jury, or for the Judge discharging the functions of a jury. *Irving v. Richardson*, 2 B. & Ad., 193, and *Richardson v. Home Insurance Company*, 21 U. C., C. P., 291. Here there was no evidence that the plaintiff contemplated insuring any interest but that represented by his mortgage. Indeed there is evidence to the contrary. The policy reads "E. P. Archbold, on account of himself, doth make insurance." This was held not to be conclusive in *Richardson v. Home Insurance Company*, but it is certainly pretty strong evidence on the point. The affidavit of claim set up no interest but that of the mortgage, and the only other evidence in the case is the statement of the plaintiff already quoted, "the owner authorized me to insure further *for my own protection*." The only remaining point is as regards the misrepresentation of interest at the time when the insurance was effected. According to the opinion already expressed on the other points, it would seem that there must be a new trial, unless the parties agree that the verdict be reduced to \$128. As the defendants can thus have another opportunity, if they insist upon it, of obtaining a re-investigation of their defence, I do not think that the Court should be called on to decide definitely upon this last point. Indeed, we might have refrained from determining one or more of the points already disposed of had our decision of them not been expressly urged at the argument. On this point I should say that, as it is quite apparent that the misrepresentation, if made, was made without fraud we should feel very very reluctant to pronounce it material, with a verdict against the defendants, with a very vague account given of what the misrepresentation actually was, without the production of the slip, or any explanation of the non-production of it, and without any evidence to shew why such a misrepresentation should be considered material, excepting the statement of the underwriters' agent that he would have considered it so.

DICKIE v. WOODWORTH.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, J J.

*(Decided January 18th, 1883.)**Res adjudicata.—Second application after failure of the first.—Costs.*

PLAINTIFF obtained an *ex parte* order extending the time for service of an election petition on the respondent, which after argument of a rule *nisi* to rescind it was rescinded because the grounds on which the original order extending the time had been granted were defective. Petitioner then made a second application and obtained a second *ex parte* order for extension of the time based upon facts which were fully known to the petitioner when he applied for the first order. Respondent after the order *nisi* to set aside the second extension and the service thereunder had been obtained, filed preliminary objections.

Held, That the second order for extension could not be made on grounds known to the petitioner when he obtained the first order, and that respondent was not prevented by filing preliminary objections from contending that the service was bad, as there was no other course open to him. The rule was made absolute without costs on the authority of the *Queen v. Manchester and Leeds Railway Co.*

This was a contestation under the Dominion Controverted Elections Act of 1874. On the fifth day of August, 1882, the petitioner commenced proceedings under the act to contest the election of respondent as a member for the House of Commons for the County of King's, by causing a petition against the respondent's return to be presented at the office of the Clerk of the Court in Halifax. On the 16th of August, 1882, an order was granted by Mr. Justice RIGBY extending the time for service of the petition, and of notice of presentation thereof, for twenty days. On the 25th of August, 1882, an order *nisi* was obtained from Mr. Justice RIGBY, which was made absolute September 27th, setting aside the order of August 16th, and the service effected thereunder, as having been improperly granted. On September 30th petitioner applied for and obtained a second order for extension of time for the service of his petition and notice of presentation, the affidavits used being the same as those used on the first application, with some others. The cause now came before the full Court on an order *nisi* to set aside the second service of the petition, on the ground, among others, that the order extending the time for the service was obtained upon a second application, and on a state of facts known to the petitioner and his counsel at the time when the first order for extension of time was applied for.

Roscoe, (with whom were *Ritchie*, Q. C., and *McCoy*, Q. C.,) in support of rule.—The petitioner shortened his own time by filing his petition on Saturday, when he might have waited till Monday. The petitioner, having obtained an order extending the time for service, and that having been adversely disposed of, could not, at common law, make a second application. *Re Hunter*, 13 Q. B., 341; *James v. Collinson*, 13 M. & W., 558; *Levi v. ———*, 3 Dowl. N. S., 932; *Regina v. Inhabitants of Boston*, 9 Dowl., 1021; *Queen v. Manchester and Leeds Railway Co.*, 8 Ad. & El., 413; 8 Dowl., 323; 1 Dowl., N. S., 792; 1 Dowl., N. S., 306; 8 Dowl., 652; 4 C. B., 736; 17 C. B., 549; 18 Q. B., 792; 6 C. B., 235. The object of the rule is to prevent parties from being subjected to repeated applications of the same kind, and to put an end to litigation. The second application here was for the same purpose as the first. The only new material brought before the Judge is the statement of Mr. Henry's absence, and that his partner could not account for the petition not having gone up on Saturday. This was not new material, but was in the knowledge of the applicant at the time of the first order extending the time. If the facts disclosed on the second application were not in existence when the first application was made they can be brought before the Court. But where the newly alleged facts were in existence when the first application was made, the second application will not be allowed. *Rob & Joseph*, Ont. Dig., 2892, citing *Pratt et al v. Jones*, 10 C. L. J., 271; 15 M. & W., 152. (*Graham*, Q. C.—None of the cases cited was an *ex parte* order.) Some of the cases I have cited were *ex parte*. The only exceptions to the rule that the Court will not allow a second application after the first has been unsuccessful, are where the affidavit is wrongly entitled, or where there is a defective jurat, or where new facts are brought out that were not in existence when the first application was made. Even if this application could be made at common law, it could not be made under the statute. The statute only provides for one application. On the face of the statute there is only one application contemplated. The provisions of the statute are penal in many respects and must receive a strict construction. *Sedg. on Statutes*, 279, 289; 3 R. & C., 584. *Wickwire v. Gould*, 3 R. & C., 477, is an

authority on the point that the statute, having been once invoked, cannot be invoked a second time. (RIGBY, J.—Can it not be contended that the statute was never invoked a first time?) I now come to the question whether the petition could be served as much as twenty days after the five days. The order has the effect of making the service lawful from the five days until the expiration of the order. The order should have been for a longer or further time, and not an extension of time. *Day's Common Law Procedure Act*, p. 242, sec. 37. The cases under that section cannot apply here. If they do apply, the reasons on which the extension was given in the cases were such as to preclude an extension here. The matter is discretionary with the Judge. The unforeseen circumstances must be such as could not have been guarded against by ordinary care. *Kelner v. Baxter*, L. R., 2 C. P., 174; *Craig v. Phillips*, L. R., 7 Ch. Div., 249. The statute must be construed strictly in favor of the respondent. In case of the dishonor of a bill, it has been held not to be due diligence to send the notice by a private means which, it is supposed, will ensure its reaching its destination at an earlier moment, if in fact it does not do so. The customary course, in cases like the present, is to address papers to the sheriff, at his address at the county town. There are no special circumstances in this case upon which a judge could act if the application were a first, and not a second one. The plaintiff knew that in matters of urgent business the sheriff's address was Kentville. Mr. Henry's affidavit shows no special facts, as he failed to act upon the circumstances which he assumed to be true. If Mr. Henry was not aware of the fact that communications intended for the sheriff should be addressed to Kentville, it was the fault of the petitioner in not communicating it. The petitioner, having been aware of the fact, and having failed to communicate it, cannot avoid the effect of any delay which accrued in consequence. The order authorizes the service of a petition on Sunday. He has until the 15th day of October, that is Sunday.

Henry, Q. C., contra.—The Statute of 1874 provides that notice of the presentation, etc., shall, within five days, or such longer time, etc., be served upon the respondent.

There are two conditions upon which the Judge may act; these may either be "special circumstances," or "difficulty." As it could not be known within the time that there was difficulty in effecting service, it is clear that the application could be made after the expiration of the time. The policy of the law is to afford the fullest opportunity for investigation of the facts. The real question is, taking the second application as if made for the first time, are there circumstances shown which would justify the extension. The application is based upon the fact that when the first application was made there were facts known by the counsel, who was absent from the city, that were not known to the party applying. The respondent, on the morning of the eighth, left the county and went to another county. From the morning of the eighth to the evening of the tenth, he was out of the county. That is surely one circumstance of difficulty. Practically, we had only two days during which service could be effected, out of the five allowed by the statute. It was not only difficult, but impossible, to effect service during the time from Tuesday the 8th, till Thursday the 10th. No unusual diligence can be rendered necessary on the part of the petitioner by any assumption that the respondent will evade service. It cannot be assumed that he intends to evade service. The Court will not tolerate such an assumption, still less will it aid him by imposing an obligation of extra diligence upon the petitioner. It is discretionary in the Judge to say what are special circumstances that will justify the extension. Mr. Dickie preferred, in this case, that the papers should go to the sheriff himself, rather than to his deputy. It was more cautious and business-like to get the petitioner himself to give it to the sheriff; and the fact that he had, on other occasions, dealt with the deputy, does not render it any the less proper for him in this case to deal with the sheriff. It is quite a question whether the deputy would be competent to serve an election petition. He made arrangements to meet the letter and put it in the sheriff's hands, which he did within an hour after its arrival. *Kelner v. Baxter*, L. R., 2 C. P., 185; citing *Ward v. Lumley*, 5 H. & N., 659; *Wheeler v. Gibbs*, 3 S. C., Canada 374. The latter case establishes the principle that the order for extending the time

can be made after the original time has elapsed. *Ib.* 389; *Banner v. Johnston*, T. R. 5 H. L., 157, 170; *Collins v. Paddington Vestry*, L. R., 5 Q. B. D., 368; *Clark v. Mann*, 1 Dowl., 656. In the case of a penal statute, the statute is to be strictly construed and strictly and absolutely followed, but no such principle applies to the act in reference to controverted elections. The policy of the law is to prevent the failure of a petition through any technical defect. In all the rules on the subject provisions are made against the defeat of the proceedings by formal defects, and the whole policy of the law is to favor the validity of the proceedings, and that there shall be an investigation. The respondent has not been prejudiced in any way by the non-service of the petition. There is no magic in the number five, and nothing in the nature of things why a petition should be served within five days. The respondent is not put to any costs, nor does he suffer in any way by the fact that the petition was not served in the statutory time. The petitioner is not asking for any indulgence or favor. The object of the law is not to put the petitioner on any strict line of conduct, or to impose any unusual promptitude upon him, but to favor the investigation of the case. If the respondent has a good case, which must be assumed if he is to receive the benefit of any presumptions at all, then no injury can happen to him from an investigation. It has been decided in Ontario that the proceedings in these cases are not penal. If so, we have not to apply any very strict principles, but to look at the matter in a reasonable light, and in the light of common sense; not that the Court can make a statute by the light of common sense. We are not asking for that, but simply that a statute should be construed by the light of common sense. In the case decided by Lord BRAMWELL there was a judgment creating a vested right, and even there the Court extended the time.

As to the right to make a second application. *2 Chitty's Arch.*, 1592, states the principle, and expressly says that the principle does not apply to rules absolute in the first instance. In all the cases cited as authority for the text, there had been a rule *nisi* taken out, and both parties had been heard, and the principle on which the second application was refused was that the matter was *res adjudicata*, and that there should

be an end of litigation. The applications in this case were *ex parte*, and the parties were not heard. As far as the question of a second application is concerned, we could go to the judge on precisely the same affidavits on which the first order had been made, without interfering with the cases cited on the other side, except that the decision on the first application would be a precedent that might govern the second. The authorities cited against us on this point refer to cases where an unsuccessful application has been made, not where, as in this case, an application has succeeded, but a successful result has been nullified by the subsequent proceedings. Inadvertence will not take away the right of appeal, even after judgment, yet it is contended that we are deprived of our right of appeal before judgment, in consequence of the inadvertence of my partner to make certain statements, in the case of my illness, when I was three hundred miles away. On the second application we showed an entirely different state of facts. I admit that many of the facts previously existed, but a reasonable explanation is offered to account for their not having been previously brought to the attention of the Judge.

Graham, Q. C.—There is no reason why this case should be treated as different from the ordinary case of an application for time to plead under section 171 of the Practice Act. Where such an application is made it has never been dreamed of to ask an attorney to account for every hour of every day. In the case of *non pros* any reasonable excuse will do. 2 *Tidd's Practice*, 762. Attention has been drawn to the distinction between extension of time before judgment and after judgment. After judgment the party is said to have a vested right in what are called the fruits of his judgment. But in the present case it cannot be disputed that the time will be extended after the expiry of five days. In reference to extensions after the time limited, see the decision of Lord CAIRNS in *L. R., 5 H. of L.*, 157. The decision of Mr. Justice JAMES, in *Hart v. Troop*, is also in point. Every one of the cases cited on the other side is cited under the old rule, "If a cause be moved in Court, in the presence of counsel of both parties, and the Court shall thereupon make an order, etc." Nothing can be more clear than that this case does not come

within this rule. Not one of the cases cited was an *ex parte* application. In the case of *Clark v. Mann*, 1 Dowl., 656, which was last cited, there was a summons which was heard in the presence of both parties. The rule I have cited does not cover the case where an *ex parte* order has been rescinded. (McDONALD, C. J.—Both parties were before the Judge and were heard.) This is not the case of an order made by the Court, both parties being present. (McDONALD, C. J.—Both parties had an opportunity of discussing all the facts brought forward in the first motion, and the Judge decided upon them.) This is not strictly a second application, the service first effected having been swept away. We are not applying for anything in connection with that service, which has been swept away, but are applying, under the statute, to effect a new service. 13 Q. B., 341; 15 M. & W., 152. In the case of a rule *nisi*, which expires, we have no statute, but go on the Common Law Practice. No decision has been produced to show that time, having been once extended, cannot be again extended. Take the case of an order for constructive service, where the party keeps out of the way. If that order is set aside could it be contended that the statute, having been invoked once, the party could not apply again. Applied to anything but an election petition, the contention could not stand for a moment. Where an indulgence is granted by a judge, the Court of Appeal will not review it. 10 Chancery Appeals, 206. Appeals are construed strictly on account of the vested rights of the party obtaining judgment below. In reference to setting aside judgments taken in consequence of negligence of attorneys, see judgment of BRAMWELL, L. J., concurred in by BRETT, J., in L. R., 3 Q. B. Div., 722. There has been no pretence that the petitioner here, or his attorney, did not act *bona fide*, or had any object for delay. In reference to extension of time for appeals, see L. R., 16 Ch. Div., 734; L. R., 17 Ch. Div., 392; L. R., 4 Ch. Div., 785. In the last case the time was extended where it had elapsed. The filing of preliminary objections after the service is made, waives defective service; the preliminary objections were filed August 26th, after the second rule was taken.

Ritchie, Q. C., (in reply), as to notice, cites *31 & 32 Vic.*, c. 125, s. 8. This shows how strictly the parties are held to the act. All must be done within the five days. In *L. R.*, 5 C. P. Div., 135, in reference to extension of time, the argument was the same as here, that no harm was done and that the Judge had the same power in reference to enlargement of time as Judges under the Judicature Act, but the principle runs through the decision that the time is to be strictly construed in order that the party petitioned against may not be kept in a state of uncertainty. It was found necessary to make a rule giving express authority to extend the time. The cases which have been cited regarding extension of time, are distinguishable from this. Some of them proceed under the rule referred to. In *5 H. & N.*, 658, the decision went on the ground that the party had a right of appeal, which was restricted. Our act is different from the English act. If service is not effected under the first extension, the Court orders a service to be effected in a special way. No second extension is contemplated. Where service cannot possibly be effected within five days, the petitioner has the right to go at once to the Judge and get a "longer time;" that is, ten, twenty, or thirty days instead of the five days originally given. The word "extend" is not equivalent to the words "longer time." If the order can be given after the expiration of the time, it gives a time upon any day of which service can be effected, and actually makes the service good which has been already set aside. The act could never have contemplated anything like this. It seems to me the whole thing is dead if it is not served or extended within the time. It is settled that the Court cannot enlarge a rule after the expiration of the time within which it is returnable. The discretion of the Judge does not come in question here; the Court is not reviewing the decision of the Judge. This is a stronger case than that of a judgment. The party petitioned against has vested rights as sitting member for the county. (McDONALD, C. J.—He is in the position of a party having a judgment.) The case in *5 Q. B. Div.* is applicable on all points to the present, as regards illness, inadvertence, &c. Practically, nothing new was brought before the Judge on the second application which should induce the Judge or Court to alter

their decision. It was incumbent on the petitioner to use ordinary diligence in forwarding the petition. The writ did not reach the sheriff until half the time for service had gone. If the first application is not considered, then the Court should take into consideration the lapse of time that then had accrued. It can be made now. In reference to the rule against renewing motions, a case like the present is not excepted. No case has been cited on the other side to show that the motion can be made a second time. The rule is defective, as having been made absolute in form, when there was a party before the Court who could be served. (RIGBY, J.—I don't consider that that point is taken in the rule.) There is no statute enabling the Court to give time to plead; it has power to give time independent of the statute. I never heard of time being applied for after expiration of the time. The statutes in reference to awards have no application; full power is given to the Court "from time to time" to make extensions; there is no limitation. The first preliminary objections went with the first service; the second objections were filed after the rule was taken. Besides, the objections raise this very question. They are equivalent to an appearance under protest.

RIGBY, J., (January 13th, 1883,) delivered the judgment of the Court:—

On the 16th of October last, an order *nisi* was granted by me, returnable before the full Court, to set aside an *ex parte* order which I had granted on the 30th day of the previous September, extending the time for service of the petition herein upon the respondent. The 8th ground set out in the order *nisi* was as follows:—

Because an order extending the time for the service of the said petition and notice had been previously granted by a Judge of this Court and afterwards discharged on the merits before the said order, dated at Halifax the 30th day of September aforesaid, was obtained, and the said last-mentioned order was obtained on a second application and on a state of facts fully known to the petitioner and his counsel at the time the first of the said orders was applied for.

In support of this ground several cases were cited at the argument shewing the English practice which precluded a party from making a second application to the Court or a Judge, after a previous one to the same effect had failed; but while it was hardly disputed by petitioner's counsel that such a practice did exist, it was urged that the present application did not come within it. I will refer to a few of the cases which recognize and define the practice in question. In *Bodfield v. Padmore*, reported as note a at p. 785 of 5 *Ad. & El.*, where a rule had been obtained to discharge a party out of custody, and had been afterwards discharged, the Court refused to entertain the same question on a subsequent application, founded upon facts, which had occurred before the previous rule was obtained, it not appearing that the party applying was then ignorant of the facts, though they were not then brought before the Court. Lord DENMAN, C. J., said, "It is impossible to re-open this question. If a party have proper materials at the time of his first application, and be not in a state of ignorance, he is not to make a new application, because he did not bring them forward at first. Nothing could be more dangerous." In *Rossett v. Hartley*, reported at p. 522 of 7 *Ad. & El.*, as note (a) it was held that if a rule be obtained and discharged before the single Judge in the Bail Court, the full Court will not allow a rule for the same purpose to be discussed before them, though on affidavits discovering facts not previously stated; and PATTESON, J., in giving judgment, said that "if the present application be in effect the same as the former one, it does not signify whether the statement of facts be new or not."

Lord DENMAN, in *The Queen v. The Manchester and Leeds Railway Company*, 8 *Ad. & El.*, at p. 427 says, "For the rule of practice, if not altogether universal and flexible, is as nearly so as possible, that the Court will not allow a party to succeed, in a second application, who has previously applied for the very same thing without coming properly prepared. We are constantly acting on this principle, of which the convenience and justice are apparent. I feel, indeed, that there is something ungracious in discharging the rule on this ground, after the encouragement held out to a second application. In particular, I take blame to myself for my share in it, having

taken the affidavits home with me for the purpose of examining, with no little trouble and consumption of time, whether they showed in themselves legal objections sufficient to entitle the party to a *certiorari*. I then assumed that if these should appear, the Court would have no choice, but must grant the rule as a matter of course. My view now is, however, quite opposite to this. I must say, (as I should have said in the first instance, had this view occurred to me,) that a party, after once failing in consequence of a defect in the way in which he brought his cause forward, is not entitled to renew the same application * * * I think that every party is to come, at first, fully prepared with a proper case, and if he fails to do so, must not afterwards renew the application with an amended case."

PATTESON, J., in *Regina v. Harland et al*, 8 Dowl., 324, refers to it as an ordinary rule of the Court of Queen's Bench, "that where a rule is discharged, on the ground of the insufficiency of the materials brought before the Court, there being other materials in existence, not brought before it, but not on the ground of defects in the title of affidavits, the Court will not allow the application to be renewed." And in *Saunderson v. Westley*, p. 653, of the same volume, COLERIDGE, J., says: "The principle is, that parties are at once to bring the best evidence in their power before the Court; and they have no right to say that it is a denial of justice not to hear the matter a second time." So in *Regina v. The Inhabitants of Barton*, 9 Dowl., 1021, the Court held the rule to be express, "that a party who has a full opportunity of bringing his case before the Court, must do so in the first instance. If he neglects the means of doing so, he cannot be allowed to come again, and put the other party to the trouble and expense of a second attendance."

In *Sherry v. Oke*, 3 Dowl., 359, a rule *nisi* to set aside an award was discharged on the preliminary technical objection that a copy of the award had not been annexed to the affidavit verifying such copy. A second application was afterwards allowed upon materials remedying the defect, and PATTESON, J., in delivering the judgment, at p. 360, stated that he considered the objection against the second motion to be conclusive where the materials had been originally defec-

tive in substance. Afterwards, this case having been cited in *The Queen, &c., v. The Great Western Railway Co.*, 1 D. & L., 874, Lord DENMAN said: "Perhaps the latitude allowed in *Sherry v. Oke*, is a little questionable. We do not wish to repudiate our power to entertain a second application, but the general rule on the subject, and on which the Court will act in the present case is as laid down in *The Queen v. The Manchester and Leeds Railway Co.*, that 'a party, after once failing, in consequence of a defect in the way in which he brings his case forward, is not entitled to renew the same application.' The only exceptions are where the defects are in the title or jurat of the affidavit. The rule is a good one, and as the present case does not come within the exceptions, it must prevail. The Court cannot look at the body of the affidavit to see whether or not the alterations are material." And PATTESON, J., said, "I also am of opinion that we must abide by the rule as laid down in the the case referred to by my Lord, that would tend to show that I went too far in the case of *Sherry v. Oke*." In delivering the judgment of the Court in *Tilt v. Dickson*, p. 744 of 4 C. B., WILDE, C. J., refers to the rule in question as one of very considerable importance; that "in the first place it tends to secure regularity and propriety in the mode of making applications to the Court. It also protects the party called upon to shew cause, from being harassed by repeated motions; and it prevents the undue and wasteful occupation of the time of the Court."

The facts before us, which are relied upon to bring this motion within the practice in question, are these:—On the 16th of August last I had made an order at the instance of petitioner's counsel, extending for the period of twenty days the time for service of the petition, which has since been served under the order now attacked. The respondent subsequently obtained an order *nisi* to set aside this order of the 16th of August, which, after argument by counsel for both parties, was made absolute by me on the 27th of September last, on the sole ground that the order of the 16th of August had been improvidently granted; in other words, that the materials on which it was obtained were defective.

I regret that petitioner's counsel did not see fit to appeal from this decision, as it would have been more satisfactory

that interests so important should not finally be determined by a single Judge ; but, as he has not done so, it seems to me that the correctness of the ruling is admitted. The affidavits on which the *ex parte* order now in question was granted, disclose no fact which was unknown to the petitioner, his agent, or counsel, when the order of the 16th of August was obtained, and the only assumption on which the second order can be supported is that the petitioner, having failed in his first application, in consequence of not bringing all the facts before the Judge, could afterwards obtain a similar order on affidavits supplying what was defective in the former application. But it seems to us that such a procedure would be directly at variance with both the letter and the spirit of the practice as laid down in the cases to which I have referred. It is said, however, by petitioner's counsel, that the practice in question does not apply to *ex parte* orders ; in other words, that a second such order can properly be moved for upon materials, known to the applicant but not disclosed, when a former *ex parte* order for the same purpose had been obtained, which was afterwards discharged in consequence of the materials upon which it was granted being defective. None of the cases which have been cited, and none that I can find, recognize such an exception. It will be noticed that the language used in most of them refers to the effect upon a second *application*, of the *failure* of a former one ; and here the petitioner may properly be said to have *failed* in his first *application*, having *failed* in his endeavour to uphold it, on the hearing of the order *nisi* to set it aside. It was for the petitioner to produce authority to support this contention of his, and the only authority on the point cited by his counsel was from the 12th edition of *Chitty's Archbold's Practice*, at p. 1592, where it is laid down that " this rule against opening or rescinding rules, made after hearing both parties, does not apply to rules which are made absolute in the first instance ; as the common rule for costs of the day for not proceeding to trial in pursuance of notice, or the like. The party against whom such rules are made absolute, may move to discharge them on showing sufficient reasons why they should not have been granted." No authorities are cited by the author for this proposition, and it evidently only refers to the recognized

right of a person against whom a rule has been made absolute in the first instance, to move, upon sufficient cause, to set it aside. Mr. Graham urged upon us, that the practice adverted to was based upon a rule of Court of the time of James I., referred to in *Chitty's Arch. Practice*, at the page already cited, and that this matter did not come within the terms of that rule. The rule is as follows :—" If any cause shall first be moved in Court in the presence of the counsel of both parties, if the same cause shall again be moved contrary to that rule so given by the Court, then an attachment shall go against him, who shall procure that motion to be made contrary to the rule of Court so first made ; and that the counsel who so moves, having notice of the said former rule, shall not be heard here in Court in any cause in that term in which that cause shall be so moved contrary to the rule of the Court in form aforesaid." From the language of this rule itself it might be inferred that it was only intended to impose a penalty for the violation of a then existing practice, and cases are to be found which do not come within its terms, in which the practice has been enforced ; for example, the language of the rule would not preclude a party who had failed in a first application from making a second one based upon facts which, though known when the first was made, had not been stated, nor does it express an exception in favor of an application which had failed from a defect in the jurat or title of the affidavits. Besides, this contention is fully met by the judgment of PARKE, B., in the case of *Dodgson v. Scott*, 2 Exch., 457, who, after consulting the other Judges of his own Court, and some of those of the Queen's Bench, stated that there was no doubt that the existing practice of the Queen's Bench was that after an application to that Court had been made and had failed on account of defective materials it would not allow any further enquiry ; and he then proceeds as follows :—" That practice appears, *not to have been first adopted, but sanctioned*, by a rule of the Court of Queen's Bench of Hilary Term, 3 Jac. I., by which it was made highly penal, if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that, upon the principle that where there has been a judgment upon the case, it was conducive to the due administration of justice

that the matter cannot be again agitated. Now there can be no doubt that the courts have gone beyond that part of the rule which requires the matter to be disposed of in the presence of the counsel of both parties, because they have held a party equally bound where the rule which he has obtained was discharged, although he himself, the counsel for the party obtaining the rule, was never heard." After the order *nisi* before us was taken out, the respondent presented preliminary objections, under the provisions of section 10 of the Act, and it was contended by petitioner's counsel that, inasmuch as that section only allowed such objections to be presented "within five days after the *service* of the petition and the accompanying notice," that the respondent, by pursuing that section, had admitted the service to be regular, or at least could not impeach it. We do not see what other course was open to the respondent if he wished to preserve his right to present the objections and yet not abandon his further right to claim that the order for service should be set aside. If he was unsuccessful in the latter motion he would otherwise virtually be precluded from presenting any preliminary objections, the time for doing so being so limited. We were told that he should have adopted the provisions of section 10, under protest, but I know of no stronger protest than the outstanding motion, and we are aware of no principle upon which the presentation relied upon ought to be considered in determining the validity of the service, which had been regularly impeached before such presentation was made.

We are, therefore, all of opinion that, upon the ground referred to, the respondent's motion must prevail. In the case of *The Queen v. The Manchester and Leeds Railway Co.*, cited above, where a party succeeded in obtaining the discharge of a rule *nisi*, upon a similar objection, the costs were refused on the ground that the Court had sanctioned, to a certain extent, the second application by granting the rule *nisi*. The order of the 30th September, with the proceedings thereunder, will therefore be set aside, but following the latter authority, without costs.

LEITH v. TROTT.

Before McDONALD, C. J., and SMITH, and JAMES, J. J.

(Decided January 18th, 1883.)

False Imprisonment.—Authority of Master of Ship.

THE master of a steamer lying in Halifax harbor, having cause to suspect plaintiff of stealing, and having procured warrants to be issued against him, confined the plaintiff while the search was being made, in order to prevent him from communicating with the rest of the crew. An action for false imprisonment was brought.

Held, that the master had acted within the scope of his authority.

This was an action for false imprisonment, brought by a seaman of the cable steamer *Minia*, against the master of the steamer. The defendant pleaded that the acts complained of were done by him in his capacity as master; also that, having cause to suspect the plaintiff of stealing certain articles, he caused him to be confined to prevent communication with the rest of the crew while search was being made. By leave of the Court an amended plea was pleaded to the effect that defendant was master of a British foreign going steamship called the *Minia*, registered in the United Kingdom of Great Britain, that plaintiff was a seaman on board said steamship, under regular articles, and that the acts complained of were committed by defendant, being such master, in pursuance of his authority as such. Plaintiff joined issue on this plea and assigned excess.

The cause was tried before JOHNSTONE, County Court Judge for District No. 1, who gave judgment for defendant. From this decision plaintiff appealed.

A. McDonald and Motton in support of rule for appeal.—The master had no right to order the plaintiff into confinement until an entry of the charge was first made in the log book. The evidence shows imprisonment and no fault charged, except the stealing, which was negatived. (McDONALD, C. J.—I think an imprisonment is shown, but if we are to believe the captain, the plea of justification is good.) As to entry in log; *1 C. & P.*, 471. The ship being in harbor, the captain had no authority to punish. The place to which the man was sent was used as a place of punishment. *1 C. & P.*, 293. There is no doubt that the plaintiff was imprisoned, and the only

justification is the evidence of admissions said to have been made by plaintiff of the stealing. At the time of the imprisonment the defendant had two warrants out against the plaintiff in connection with the stealing. We should have been allowed to give evidence in reference to the alleged admissions.

Tupper, contra, was not called upon.

MCDONALD, C. J.—In my opinion the conduct of the master was entirely within the scope of his authority. The plaintiff was charged with stealing goods of the master, and the latter had a perfect right to take any reasonable means to verify the truth of the suspicion. The means he took,—separating the plaintiff from the rest of the crew, for the avowed purpose of making a search,—in my opinion were proper, and I do not think it was an imprisonment for which he is liable. The appeal must be dismissed with costs.

BANK OF BRITISH NORTH AMERICA v. BELL.

Before SMITH, JAMES, and WEATHERBE, J. J.

(Decided January 21st, 1883.)

Action for money received.

PLAINTIFFS, having recovered a judgment and issued an execution against the judgment debtors, were about bringing action against the defendant, (the Sheriff,) for negligence in the execution of the writ, whereupon defendant, by his attorneys, wrote plaintiffs asking permission to be allowed to issue an execution against the debtors, in order that the Sheriff "might be able to find sufficient property to save himself from loss." Plaintiffs gave the permission to defendant to issue the execution "on his own responsibility, and to be considered totally irrespective and apart from the suit we are now about to bring against the Sheriff." The execution was accordingly issued and \$200 collected, which the Sheriff declined to pay over until the suit for damages was determined. An action was brought for money had and received.

Held, that the verdict for defendant must be sustained.

Per WEATHERBE, J.—That under the correspondence the money collected was to be held for the purpose of indemnifying the defendant from loss in the proceedings to be taken against him, and that, until that matter was settled, plaintiffs were estopped from claiming the money so collected.

Plaintiffs, having recovered judgment in the Supreme Court in a suit against D. Henry Starr and John Starr, issued execution and placed the same in the hands of the defendant, who was High Sheriff of the County of Halifax, to be proceeded with. Subsequently, the plaintiffs caused a writ of summons to be issued against the defendant, setting out the

recovery of the judgment against the Starrs, and the issue of execution thereon, as above stated, and charging the defendant with wilful disobedience and neglect of duty, in the execution of the writ. On being notified by the plaintiffs of their intention to proceed against him, the defendant, with the view of protecting himself, caused a letter to be addressed to the attorneys of the plaintiff, in the following terms :—

HALIFAX, 6th October, 1880.

BANK OF B. N. A. v. STARR.

Dear Sirs,—The Sheriff has handed us your letter of the 4th inst., in reference to this suit, notifying him of an action at plaintiff's suit in consequence of his alleged failure to obtain the money or to arrest under the execution which has lately expired. We will accept service of process on behalf of the Sheriff.

As we are confident that in this matter you have not, nor has the bank, any other desire than to get the money due, and as we presume you yourselves will not issue another execution, but will look to the Sheriff for the money, we hope you will be willing to agree to the following proposal :—

We wish you to allow us to issue an execution on behalf of the bank against the Starrs. The Sheriff may be able to find sufficient property and will thereby save himself from loss. We will, and do hereby undertake that in any suit you may bring against him, it will be considered, as between the bank and himself, that no such execution has been issued, nor shall any reference be made to such permission either in the pleadings or at the trial, (if any,) or in any other way.

We wish you to consider this undertaking as broad as it can possibly be made, so that you may not in any way be prejudiced by the permission we have asked. We would be obliged by an answer at as early a date as possible, as we want to secure any goods that the Starrs may have.

This letter is not to be treated as any admission of liability by the Sheriff, and is to that extent without prejudice.

Yours truly,

SEDGEWICK & STEWART.

Messrs. McDonald, Rigby & Tupper,

Barristers, &c., &c., City, &c., &c.

To this letter plaintiff's attorneys replied as follows :—

OCTOBER 7TH, 1880.

BANK OF B. N. A. *v.* STARR.

R. SEDGEWICK, Esq. :

Dear Sir,—Yours of 6th received. In reply we have to say that we will permit you to issue an execution on this judgment on your own responsibility, and to be considered totally irrespective and apart from the suit we are now about to bring against the Sheriff.

Will you let us know by to-morrow if the Sheriff intends to return the execution at once in this matter, as we shall have to enter the cause for a rule to return on Tuesday next.

Yours, &c., &c.,

MCDONALD, RIGBY, & TUPPER.

Under the authority so given, the defendant issued an execution in the plaintiffs' name against the Starrs, and collected from them the sum of two hundred dollars. Plaintiffs' attorneys having made a demand to have the amount so collected paid over to them, and the defendant having declined to pay it until the termination of the suit brought against him by the plaintiffs for the alleged negligence and disobedience, plaintiffs commenced a second action for money had and received, &c., to which defendant pleaded never indebted as alleged, &c. This cause was tried before SMITH, J., at Halifax, without a jury, and, a verdict having been found for defendant, a rule was granted to set the same aside as against law and evidence.

Tupper, in support of rule.—Before the writing of the letters between the parties there can be no question that the money belonged to the plaintiffs, who had the right to issue an execution and collect it, whether an execution was pending against the Sheriff or not. It was never agreed that the money should belong to the Sheriff. The defence could only be raised, if at all, by an equitable plea. Under the terms of the letter written by defendant's attorneys, his undertaking was to be as broad as possible. We were not to be prejudiced in any way. The execution was issued for the bank, and for

their benefit in every sense. (WEATHERBE, J.—If the execution was set up in answer to the previous action, you would plead that it was not for you.) It was totally irrespective of the previous suit. (SMITH, J.—For whose benefit was it?) In one sense, for the benefit of the Sheriff, in another, for our benefit. (WEATHERBE, J.—Could the defendant have referred to this execution in the previous suit without a breach of faith. Would he not, in such case, violate this stipulation.) No. (WEATHERBE, J.—The proposal is that whatever comes of the execution the defendant shall not be permitted to mention it at the trial. If he attempted to do so you would object and claim the whole amount.) Yes. But if he is in an unfortunate position we did not put him there. (WEATHERBE, J.—If we give you judgment for this amount now defendant cannot set it up on the trial.) No. (WEATHERBE, J.—And you can still recover the full amount of the damages.) Yes. If the Sheriff wished to retain the money until the determination of the action for damages, he should have said so; but no such intimation was given. (SMITH, J.—You declined to issue another execution and chose to look to the Sheriff for the whole amount of the debt. The Sheriff then asked and obtained your permission to issue an execution in the name of the bank in order to indemnify him against the action for damages.) We did not assent to anything more than that the Sheriff should be at liberty to issue the execution. (WEATHERBE, J.—He was to take the whole responsibility of issuing the execution, but was to have no advantage.) We allowed him to collect the money, but it was for us to say what was to be done with it. It was ours. (SMITH, J.—The whole thing is in a nut shell. The right of the bank to the money under ordinary circumstances cannot be doubted. The question is, whether it was restrained by the correspondence. WEATHERBE, J.—We have to determine the intention of the parties, and, to arrive at that, must enquire what the result of the threatened suit would be.)

Bell, contra.—The execution was issued under a license from the plaintiffs, in order that the defendant might protect himself against the action for damages; but it is contended that the plaintiffs can claim the money, and the defendant,

after having taken the responsibility of collecting the money, shall have no protection. The Court may order the money to be paid. *25 Am. Dec.*, 490. The plaintiffs could recover both debt and damages. *6 Am. Dec.*, 46. The plaintiffs are estopped by their letter.

Tupper replied.

SMITH, J.—The majority of the Court are of opinion that the verdict must be sustained.

WEATHERBE, J.—I think the correspondence between the plaintiffs and defendant shows that there was an understanding between them that the money should be collected by the defendant in the present action, on an execution issued in the name of the plaintiffs in the other suit, and that the money was to be held for the purpose of indemnifying the defendant in this action from any loss that might be sustained by him on account of the proceedings to be taken by the plaintiffs against him. I cannot see any other meaning that can be attached to it. The distinct understanding, according to the letter of McDonald, Rigby and Tupper, was that any execution issued was to be issued on the responsibility and at the entire risk of the Sheriff, who is alleged to be liable to the bank for negligence in connection with a former execution. If the Sheriff was to be liable for the proceedings taken on the second execution, then his position was such that the plaintiffs, in claiming that money afterwards, before the matter was settled as to whether there was any liability, altered his position entirely. Until such time the plaintiffs had no right to claim the money, or, in other words, were estopped from claiming the money collected for the purpose of meeting that liability. The plaintiffs could not say, in the face of the correspondence, that they were to have the money at once, whether there was a liability or not. I think the money should be held for the purpose for which it was collected. If a loss took place through the negligence of the Sheriff, and the Sheriff was made liable, this money was collected to indemnify him. If he paid it over to the plaintiffs he would have nothing to indemnify him, and the correspondence would have been meaningless. I think it can only have one meaning.

JAMES, J.—I do not assent to the meaning which has been attached to the correspondence; but, besides, the correspondence refers to a different suit, and the stipulation is that the correspondence is not to be used in that suit. If it was intended that it should refer to a suit which might arise afterwards, I think it should have been mentioned. It should have appeared in the correspondence. I think the correspondence cannot affect this suit in any way.

CARNEY v. PHALEN.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided January 21st, 1885.)

Co-Surety.—Contribution.

SURETY held not liable for contribution, where there was no liability shown on which money should have been paid by the co-surety.

This was a rule taken to set aside a verdict for plaintiff in an action against a co-surety on a bond given by their principal for the faithful management of the property of minor children. The cause was tried before DESBARRES, J., at Halifax, in May, 1881.

Graham, Q. C., in support of rule.—A deficiency in the assets was admitted by Cummins, the principal, to the extent of \$2,000, and the Judge of Probate founded a decree on that admission that Cummins was liable in that amount. The sureties were not summoned. A suit was then brought against the sureties and was discontinued on payment of the amount by the present plaintiff, one of the sureties, who now sues the defendant, his co-surety, for his proportion of the amount so paid. If the principal had a good defence to an action for the deficiency, the plaintiff had the same. There is no proof that the sureties were liable. A judgment against the principal is not binding on the surety. *Ex parte Young*, 17 Ch. Div., 668; 45 L. T. R., (N. S.), 490; 24 Wend., 35.

Meagher, Q. C., was called upon, *contra*.—The bond was given to the Judge of Probate under the chapter of the

Revised Statutes, "Of Guardians and Wards." The Court of Probate has exclusive jurisdiction, and the administrators were properly cited. If so, the judgment of the Probate Court would be binding on the administrators and sureties as well. *Schouler on Domestic Relations*, p. 697, and cases cited. There is no provision for bringing the sureties in, and if they were brought in, I doubt if they would have a right to be heard. The Court having jurisdiction and the parties being properly summoned, the decision of the Judge as to the amount of assets would be binding on all parties. (JAMES, J.—Would it be binding on parties not there?) The decree is *prima facie* in our favor. The sureties have agreed by their bond to be bound by the account rendered by their principal to the Probate Court. The account which he, through his administrators, has rendered, shews a large deficiency. (WEATHERBE, J.—They have not agreed to be bound by Cummins' account. The breach would be that he had not faithfully managed the property, but had committed waste. Where is there anything in the decree to shew a breach?) It was incumbent on the representatives of Cummins to pay the money over. The fact that Carney was obliged to pay the money shews that it was not paid by Cummins. The moment a surety is sued a right of action arises against his co-surety. He is not obliged to defend. *6 M. & W.*, 153; *8 M. & W.*, 538. (WEATHERBE, J.—Not if he is liable; but is there anything to shew that Carney was liable?) The bond is produced to which Phalen was a party, and the decree. (WEATHERBE, J.—The decree does not state a breach, but assuming it does, must you not shew a breach independently under the case cited?) The case does not apply. It was a case in bankruptcy, where a different principle applies. The case in *6 M. & W.*, 153, goes much further than this case. If a party to a note can, by writing on the back of it, make a statement that one of the parties is a principal, and that is evidence against the party here, where a court of competent jurisdiction has dealt with the matter and passed a decree, the decree should be *prima facie* evidence of breach of duty on the part of the guardian, which would enable one surety to recover against the other in a suit for contribution. (Graham, Q. C.—In the case cited the evidence was received

as an admission against interest of a party deceased.) *Burge on Suretyships*, 282, 283; *DeColyar*, 341.

SMITH, J.—We do not think a case has been made out on which one co-surety can make another contribute.

WEATHERBE, J.—I do not think there is any liability shewn upon which the plaintiff should have paid the money at all. I think the case cited with regard to the admissibility of the decree applicable, but I do not think the decree or the facts shew a liability. It appears that the points were taken on motion for nonsuit at the trial, and I think they should have prevailed.

EAVES v. DARLING.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided January 23rd, 1883.)

Security for costs.—Defence on the merits.

THE defendant, applying for security for costs on the ground of plaintiff's residence out of the jurisdiction, swore that the action was on a promissory note, against defendant as an indorser, and on the common counts, that the defendant never was indebted as alleged, and had a good defence on the merits, and believed he would be able to substantiate a good defence. And, further, that plaintiff had previously sued for the same cause of action, in which defendant had obtained judgment, plaintiff not having given security for costs as ordered.

Held, that the appeal from the rule refusing the security must be dismissed.

Seemle, that defendant had not "made it appear" by affidavit that he had a good defence.

Appeal from a decision of WEATHERBE, J., discharging an order *nisi* for security for costs. The order for appeal was taken on the grounds,—1st, that the order *nisi* should have been made absolute; 2nd, that the defendant, by his affidavit in support of said order *nisi*, complied with the statutory requirements and made a defence appear.

The words of the statute, Acts of 1879, chapter 19, section 21, are as follows: "When security for costs is applied for upon the ground that the plaintiff is beyond the jurisdiction of the Court, no such security shall be ordered unless it be made to appear by affidavit at the time of such application that the defendant has a good defence to the action on the merits, and that such application is not made for delay."

Defendant's affidavit, upon which the order *nisi* was granted, was as follows :—

“ I, Lorenzo F. Darling, of the City and County of Halifax, merchant, make oath and say as follows :—I say that this is an action upon a certain promissory note, alleged to have been made by one S. J. Cohn, in favor of myself, and endorsed by me, and upon the common counts, as on reference to the declaration herein will more fully appear. I say that I am not and never was indebted to the said plaintiff, as alleged, and that I have a good defence upon the merits, and I believe I will be able to substantiate a good defence on the trial hereof. I say that suit was brought before on the same note, and for the same alleged causes of action as in this cause, and that I obtained judgment, the same plaintiff who is plaintiff herein having failed to give security for costs, after having been ordered by the Court so to do. I say the plaintiff resides out of the jurisdiction of this Court, and resides and does business in Montreal, in the Province of Quebec. This application is not made for delay, but that I may obtain security for costs in this suit in which I am informed and do verily believe I will obtain final judgment.”

The appeal was argued January 22nd, 1873.

Tupper, in support of appeal.—The affidavit of the defendant discloses a defence. He says: “ I am not and never was indebted to the plaintiff, as alleged.” This is going beyond the ordinary affidavit of a good defence on the merits. He says, as a matter of fact, that he was never indebted,—he never owed the plaintiff one farthing. This is the best defence he could have. He also makes it to appear that a previous action was dismissed because the plaintiff failed to comply with a rule for security. The act in reference to holding to bail is applicable. I admit it must appear that we have a defence, but must we go into the particulars of it? (SMITH, J.—In the case of opening up a judgment where the words are analagous we have decided that it is not enough to swear that you have a defence on the merits, but you must set out the defence.) In England the bald statement of a defence on the merits will suffice in opening up a judgment. In *4 Dowl. P. C.*, 382, it was contended that an affidavit to,

hold to bail was insufficient in not alleging presentment of a bill, but it was held otherwise. In the present case it is asking the Court to go too far to hold that an affidavit of never indebted in an action on a note denies the endorsement. The case of *Simons v. Anderson*, 7 Taunt., 751, also bears on the use of a legal word like the word "indebted." A distinction is drawn between the language of an affidavit and that of a declaration. The case of *McDonald v. Barton*, Canada Law Journal, (New Series,) vol. 2, pp. 100, 190, decides the very point on an application for security for costs. *Warrington v. Leake*, 11 Exch., 304, is an authority in reference to opening up a judgment. The case of *Wiley v. Wiley*, 4 C. B., N. S., is relied on on the other side. *Warrington v. Leake* is mentioned. It is to the effect that something more must be said than that a party has a defence on the merits, though he need not do so with particularity. We have come within the rule in that case.

SMITH, J., delivered the judgment of the Court on the following day :—

We have considered the argument addressed to us yesterday in support of the appeal, and do not think it necessary to call upon the other side. The judgment appealed from must be sustained.

THE QUEEN v. ELZE.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J J.

(Decided February 2nd, 1883.)

Forfeiture of mining areas.—Notice to mortgagee.

PROCEEDINGS were taken to forfeit certain gold mining areas, and the notice pursuant to statute was addressed to the defendant, who was the mortgagee and not the owner of the areas.

Held, that the Commissioner of Mines had no jurisdiction for want of notice to the owner.

Defendant was mortgagee of certain gold mining areas at Waverley, in the County of Halifax, which were held by Charles Burkner, under lease from the Crown, dated August 11th, 1870. In January, 1881, proceedings were commenced to forfeit the areas in question by posting a notice thereon

addressed to the defendant, setting out that it had been brought to the notice of the Commissioner of Public Works and Mines, that the mines and minerals in the said lease described and conveyed had been abandoned for the space of one year, and had not been effectively or continuously worked, or had been worked only colorably, and that the said lessee and transferee had failed to comply with the terms, covenants and stipulations in the lease contained, and notifying the defendant that the said charge or complaint would be investigated before the Commissioner at his office in the Province Building, Halifax, on the eighteenth day of February, A. D. 1881, at 11 a. m.

On the day mentioned, the defendant having failed to appear, and the posting of the notice, and the fact that no returns of labor performed, or of gold obtained from the areas contained in the lease had been made for the year ending September 30th, 1880, nor for some time previous, nor to the date of the investigation having been proved, the Commissioner gave judgment as follows:—

In pursuance of a notice duly served on Karl Elze, (by posting as provided in clause 67, chapter 9, *Revised Statutes*, of Mines and Minerals and subsequent Acts,) transferee under a lease of certain mining areas, situate and being at Waverley, in the County of Halifax, made between the Queen, of the one part, and Charles Burkner, of the other part, and dated the sixth day of August, A. D. 1870, I have examined into the matter of complaint against the said Karl Elze for not working the said mining areas effectively and in accordance with the terms, covenants and stipulations in the said lease contained, and the true intent and meaning of the laws in such case made and provided, and, on due consideration, after the examination of witnesses and the facts of the case, I, being satisfied that the charge has been fully made out, have decided and declared, and by these presents do decide and declare the said mining areas, and every part and parcel thereof, to be forfeited.

The proceedings were brought up to the Supreme Court by *certiorari*, and a rule was taken to set the forfeiture aside as irregular and void, on the grounds, among others :

Because defendant was not the lessee of the areas forfeited.

Because Charles (or Karl) Burkner was the lessee of said areas at the time these proceedings were instituted and was not made a party hereto, the interest of the defendant in said areas being that of mortgagee only.

Because no notice of the proceedings to forfeit said areas or lease was given to the defendant or posted as required by law.

Because no notice of the proceedings to forfeit said lease or areas was given to the lessee or posted as required by law.

Because no proof was given before said Commissioner that no agent or person could be found upon whom to serve the notice, or that the notice to the defendant of the forfeiture of said areas was served or posted pursuant to the statute.

The rule was argued January 31st, 1883, by *Ritchie, Q. C.*, in support of rule, and *Graham, Q. C.*, contra.

Graham, Q. C., took the preliminary point that on *certiorari* the minutes of evidence taken by the magistrate cannot be received. An affidavit may be produced to shew what was proved before the magistrate. (RIGBY, J.—Where the statute, in a case like this, says that the magistrate shall take evidence, and he does so and returns it to this Court, I think we can look at it.) I don't think any case can be produced to show that the Court can look at the evidence, even where it is taken under statute. Where a conviction is valid on its face you cannot go behind it and look at the evidence. (McDONALD, C. J.—That is new to me. WEATHERBE, J.—The practice is the other way.)

Ritchie, Q. C.—The statute requires the evidence to be in writing and signed by the parties to make it part of the record. What evidence could be better? The points are all contained in the rule; first that the defendant was not the lessee of the areas forfeited. Burkner was lessee and the only interest of Elze was as mortgagee. Section 132 provides for the registration of mortgages. The only person notified under section 67 was the mortgagee. The evidence of the posting is altogether insufficient. O'Toole does not swear that he posted it. It is almost identical with the affidavit in *The Queen v. Tobin*, 2 R. & G., 305; though in that case the

affidavit was explicit that the party making it did post the notice. The judgment does not follow the notice, but purports to make the forfeiture on a different ground. The judgment is not signed by the Commissioner as such. The notice of forfeiture was by a private individual and not by an official.

Graham Q. C., contra.—On a writ of error, after a bill of exceptions was tendered, it was held that the evidence was part of the record and could be looked at. There is no case where, under a writ of *certiorari*, it was held that the Court could look at the evidence. It may be the misfortune of the defendant and of Burkner, that a valuable property has been swept away from them without actual notice, but it is the fault of the statute that where parties are out of the Province and have no agent here, notice may be given in a particular way. In this Province we follow the practice in England previous to 1 William IV., in reference to *certiorari*. In this case the parties had the statutable remedy of an appeal. True, they had no notice, but the statute which prescribes the mode in which notice is to be given is to blame for that. The transfer from Burkner to Elze was not a mortgage, but a conditional sale. The judgment of the Commissioner is in the statutable form. There is no pretence that work was being carried on on the areas, and it is shown by Mr. Cameron's affidavit that no returns were made. Any irregularity is waived by the defendant not being present and not availing himself of his statutable right of appeal. The Commissioner of Mines finds, as a matter of fact, as appears from his judgment, that the notice was duly served. Evidence of the notice was given before him.

McDONALD, C. J.—As far as I can see, Elze had nothing to do with the property, The transfer to him from Burkner was a mere security for money advanced.

McDONALD, C. J., (February 2nd, 1883,) delivered judgment as follows :—

The rule must be made absolute to quash the forfeiture. My own decision is principally on the ground that there was no notice given, as required by the act, inasmuch as Elze was a mortgagee only, and the only notice of which there is any

pretence was to him and not to the lessee. That is enough of itself to invalidate the forfeiture.

RIGBY, J.—I think we have a right to look at the judgment of the Commissioner of Mines, and on the face of it it appears that the notice was to Karl Elze. Karl Elze was mortgagee of the property, whereas, to give the Commissioner jurisdiction, notice should have been served upon the lessee. No such notice having been served, there was no jurisdiction.

COLLIE v. BELL.

Before SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided February 5th, 1883.)

Sale of an interest in the result of a fishing voyage.

PLAINTIFF levied upon the interest of sharesmen in fish secured as the result of a fishing voyage, and purchased the said interest at the sale. Defendant, having sold the fish under a bill of sale, which was found by the County Court to be fraudulent,

Held, that plaintiff could recover nothing from defendant under the common counts, as the most that he was entitled to under his purchase was an accounting.

Plaintiff, having recovered judgments in a magistrate's Court against two of the sharesmen of a fishing vessel, of which defendant was master and part owner, issued executions under which the interests of the sharesmen in certain fish, the result of the voyage, were levied upon and sold at auction, plaintiff, as the highest bidder, becoming the purchaser. The defendant having sold the fish under a bill of sale, alleged to have been made prior to the issue of the executions, plaintiff brought an action on the common counts in the County Court for District No. 2, to recover the proceeds of the sale. The cause was tried before M. B. DESBRISAY, Esquire, County Court Judge, who, being of the opinion that the sale relied on by defendant was fraudulent, gave judgment for plaintiff, but granted a rule for appeal, which now came on for argument.

Henry and Weston, Q. C., in support of the rule were stopped, and *Meagher, Q. C.*, and *Sedgewick, Q. C.*, called upon to show evidence of a settlement between the captain and

sharesmen prior to the sale under execution. Plaintiff sold the interest of the sharesmen. Defendant, at the trial, relied entirely on a previous purchase, and cannot now set up a different ground. There is nothing more to show an accounting than that the sharesmen were entitled to a certain amount, less their proportion of the supply bill. (RIGBY, J.—There was no privity unless the defendant held a specific amount to the plaintiff's use.) We were entitled to the interest of the sharesmen in the fish, under the sale under execution. (RIGBY, J.—You were entitled to an account. The contract was that the master should sell the fish and pay the sharesmen their shares, less their proportion of the supply bill.)

The COURT.—The appeal must be allowed.

MILLER v. LING.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided February 7th, 1883.)

Landlord's lien for rent. Meaning of "Execution," in R. S. cap. 107, sec. 7.

SECTION 7 of Chapter 107, *Revised Statutes*, (4th Series), providing that no goods shall be removed from the premises under execution until one year's rent, or a rateable part thereof be paid to the landlord, does not apply to goods taken under attachment under the Absconding Debtors Act.

On the 27th January, 1882, plaintiff attached defendant's goods under the Absconding Debtors Act, *Revised Statutes*, (4th Series,) Chapter 97. Three days later a quarter's rent became due for premises of which defendant was lessee, and from which the goods were removed. Defendant's lessor thereupon applied to JAMES W. JOHNSTONE, Esquire, County Court Judge, for District No. 1, on affidavit, and obtained an order *nisi* calling upon the Sheriff to pay to her, out of the proceeds of the goods attached, the amount of rent due, and to retain such sum in his hands until the final disposition of this rule. The Sheriff offered no opposition, but expressed his willingness to abide by the decision of the Court. After hearing counsel for the plaintiff, the learned County Court

Judge pronounced the following decision, making the rule absolute :—

This application is based on section 7, chapter 107, *Revised Statutes*, 4 Ed., which provides that no goods shall be removed under execution until one year's rent be paid the landlord, and, if the rent be not actually due, then a rateable part thereof up to the day of the execution. The application was resisted on the ground that the statute applies only to executions, and the goods in question were taken under attachment under the Absent and Absconding Debtors' Act. The act mentions no other writs than writs of execution, but the intention of the act was to give landlords a specific lien for their rent, and our act goes a step further in that direction than the English act, inasmuch as it gives the landlord the portion of rent not accrued due at time of levy. The reason of the act is because goods in the custody of the law under an execution cannot be distrained, nor can goods in the custody of the law under attachment, for the same rule must apply to both. I think that the principle is the same in both cases, and from analogy and by the equity of the statute, that statute must be intended to apply to goods seized under attachment. No notice was served on the Sheriff prior to the removal of the goods, but he is bound to retain up to one year's rent out of the proceeds of the tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands, and the same will be ordered to be paid to the landlord when the notice was given subsequent to the removal of the goods; *Arnitt v. Garnett*, 2 B. & Ald., 440. If the Sheriff had removed the goods after notice he would have been a wrong-doer, but the want of notice does not prejudice the landlord's claim, provided it is given before the Sheriff parts with the property or the proceeds. At the argument I was inclined to think that the plaintiff was entitled to his costs in obtaining judgment, the same having been incurred before notice, but subsequent consideration has convinced me that such was not the case. The claim for rent is a prior specific lien, taking priority of all other claims, and so much so that if the rent is not paid him the Sheriff is bound to withdraw and not proceed with the sale. Here the rent was not due by a few days at the time of the attachment,

therefore the landlord could not distrain and was not bound to be continually watching the property to give notice in case of a levy. The law protects him in his right of lien, and I can find no case giving plaintiff right to deduct his costs, though the Sheriff is entitled to what costs he has incurred prior to notice. I shall make an order, similar to the one made in *Henchett v. Kimpson*, 2 Wils., 140. The Clerk of this Court will take an account of what the goods attached sold for; he will allow the Sheriff such costs as he had incurred before the notice given him of the rent due to the landlord, and, after all such deductions, the rest of the money shall be paid by the Sheriff to the landlord. If there is any dispute as to the amount of rent up to the attachment, let the clerk settle it, but I cannot see how there can be any, as there will not be in the Sheriff's hands enough to meet what is indisputably due. Each party will pay his own costs of this application.

From this decision plaintiff appealed.

Longley, in support of appeal, took the ground that a writ of attachment is not an execution within the meaning of *Revised Statutes*, chapter 107, section 7, and cited *Hobrecker v. Johnston*, (unreported,) and *Brandling v. Barrington*, 9 D. & R., 609. He was then stopped by the Court.

Mills, contra.—Before proceeding to a consideration of the case of *Brandling v. Barrington*, I wish to cite certain other cases and authorities showing generally the nature and scope of the statute, 8 Anne, chapter 14, section 1, from which the statute under which we are proceeding is taken, and also to show that our writ of attachment is an execution within the meaning of such statute, for which last contention I think we shall find abundant reasons in the laws of England and America.

1. From decisions on analogous processes in England. *Tidd* says this statute extends to all manner of executions for the subject, and a sequestration out of Chancery has been held to be an execution within its meaning; "for the legal remedy by distress cannot be enforced against sequestrators." 2 *Tidd's Prac.*, 1014. It is important to note the reason given by *Tidd* why the sequestration is considered an execution: it is because the remedy by distress is taken away. Then the

landlord is otherwise protected, namely, by the statute. But goods in *custodia legis* under *fi. fa.*, or attachment, are also not liable to distress. 1 Sm. L. Cas., pp. 532, 534, (5 Am. Ed.) notes to *Simpson v. Hartop*. It follows, therefore, that an attachment must be placed in the same class with a sequestration, namely, an execution within the meaning of this act. The injury to the landlord is the same in both cases, he loses his right of distress; the remedy is the same, the statute secures him his rent. This is the true test; if the execution of a process takes away the right of distress, the process is an execution; if it does not the process is not an execution within the meaning of this act. Upon reference to the case reported in 15 East., 230, we get further proof of this proposition—proof from the negative side of it. In this case a Commission of Bankruptcy was held to be not an execution, because it did not take away the right of distress. We must then conclude that this is the true test, and, applying it to our attachment, we see at once that our writ comes within the meaning of the word “execution” in this act. In the *St. John College v. Murcott*, 7 T. R., 259, a *capias ulegatum* was also held to be an execution. See per LAURENCE, J., at page 264. Now this *capias ulegatum* was mesne process, and strikingly analogous to our writ of attachment. The proceedings to outlawry were tedious and expensive. When the defendant, after various initial steps, had been cited by proclamation from County Court to County Court for five successive times, and still failed to appear, then this writ might issue. When the defendant was so often called and did not appear, it simply showed what our affidavit shows, the defendant to be absent or absconding. And this being shown, a *capias ulegatum* might issue against the defendant's goods, just as, in our practice, upon the affidavit for attachment, the attachment issues. This case, therefore, as well as the cases cited in it, we must consider directly in point. In the case of *Giles v. Grover*, 9 Bing., 128, we have an elaborate discussion of the effect of a levy under *fi. fa.* by the ablest Judges in the highest Court in England, and fully supporting the following propositions:

(1.) The goods are in the custody of the law, the Sheriff holding as bailee *virtute officii*.

(2.) The property in the goods is not divested by the levy from the owner, from whom they were taken.

(3.) The levy puts no property, not even a lien, in the party issuing the process, but the property is charged to be used by the law, through its officer, (the Sheriff,) to satisfy the plaintiff's claim, by reason of priority and not of property.

In *ex parte, John S. Foster*, 2 Story, 131, Mr. Justice STORY, in an insolvency case before him, after a full consideration of *Giles v. Grover*, says: "The case of an attaching creditor is not nearly so strong as that of a judgment creditor who has obtained a *fi. fa.* under which the Sheriff has actually seized the goods of the judgment debtor to satisfy the same. And yet in this case it is perfectly clear, that before a sale the general property of the debtor is not divested, and that the creditor does not under the levy under the *fieri facias*, acquire any interest or right in the property. This subject underwent a very elaborate consideration of all the Judges in the case of *Giles v. Grover*, 6 Bligh, R., 279; 9 Bing., 128. I have dwelt the more upon these authorities because, if they present, as I think they do, the true state of the law, even in the case of a seizure under execution, they necessarily apply with greater force to the case of a mere attachment which, at most, can be no more than a contingent, conditional lien or security to satisfy the judgment of the creditor, if he ever obtain one; whereas, on an execution, the debt has been already ascertained and fixed by the judgment." As, therefore, the execution and the attachment are identical in effect, and the statute was enacted to guard the landlord from the effect of the one, as is admitted, so it must be held to guard him against the effect of the other. I am now in a position to consider the case of *Brandling v. Barrington*, 6 B. & C., 467, which I hold utterly inapplicable to the present case, for the two following reasons: *First*, This was an action against Sheriff Barrington for taking goods of one Hudson, (the plaintiff's tenant,) under proceedings commenced by *pone per vados*, at suit of Thompson, without satisfying rent due. In this original suit, under the local practice of the County Palatine of Durham, nothing could be taken under the *pone* itself, but only on the *distringas* subsequently issued, and these seizures were fines for contempt of court, forfeited to

the Lord Bishop of Durham *jure regali*, and not levies made for the satisfaction of the plaintiff's claim. The mere seizure transferred the property to the Bishop *jure regali*. This is entirely different from the effect of a levy under execution or attachment, for such a levy in itself makes no transfer of property in the goods whatsoever, and they are held by the Sheriff for the satisfaction of the plaintiff or judgment creditors, as we have seen from the cases just cited. The property in the goods being completely divested from the tenant, and vested in the Bishop, *jure regali*, the case was very much as though the tenant had made a complete sale of them, and the purchaser had taken them away; and, therefore, there could be no pretence that the landlord had any more legal claim upon these goods than upon the Royal revenue or the Bishop's Cathedral. *Secondly*, The cardinal distinction, however, between *Brandling v. Barrington* and the present case is, that that was an *action* against the Sheriff, whereas this is an application to the Court for assistance. It is true Sheriff Barrington was exonerated, as well he might be in such a case, but the Judges did not at all decide that the landlord was without any remedy. (THOMPSON, J.—If, as you have said, the landlord had no more claim to the goods than to the Bishop's Mitre, what could be the good of an application to the Bishop?) He might apply to the Bishop as judge of the original court, just as we have applied to the Judge of the County Court. Lord TENTERDEN, C. J., after referring to several earlier cases where the landlord's right had been allowed, and pointing out that they were not actions against the Sheriff, but all applications to the Court, says, (p. 476,) "It appears to me that the plaintiff has mistaken his course, and that, instead of suing the Sheriff, he should have applied by way of petition to the Bishop's Court. What would have been the effect of such a petition it is impossible to say; but, upon the authority of the cases which have been referred to, it probably would not have been dismissed without much consideration. These goods were forfeited to the Bishop *jure regali*, and were at his disposal. An application to him under such circumstances would be like the application to the Court of Exchequer in the case of outlawry on civil process, and it would be in his power to grant relief to

the landlord. But I think the landlord cannot treat the Sheriff as a wrong-doer, and, therefore, our judgment must in this case be for the plaintiff." BAYLEY, J., rested his judgment on the same ground as the Chief Justice, and HOLROYD, J., said : " The giving of the goods to the plaintiff was a mere voluntary act of the Bishop, to whom they had been forfeited and who had power to dispose of them as he thought fit. The proper course for the present plaintiff was to apply to the Bishop by way of petition, then he might have obtained relief ; but he has no right to recover against the Sheriff." This, I submit, completely distinguishes *Brandling v. Barrington* from the present case.

2. From the construction which has been put upon the statute. In *Henchett v. Kimpson*, 2 Wils., 140, PRATT, C. J., said, (and the Court concurred,) " The statute shall have a liberal construction." " Before the statute, execution took place of all debts that were not *specific liens*, even of rents due to landlords ; it was thought hard that landlords should not have something like a *specific lien*, so the Parliament have given them this remedy for one year's rent." In *Arnitt v. Garnett*, 3 B. & Ald., 440, the statute also received a liberal construction—all the Judges agreeing that to hold that the landlord lost his remedy (by application to the Court) by the Sheriffs' mere removal of the goods without notice, would be a virtual repeal of the statute. Now, it is not a violent construction to hold that " execution " includes attachments. " Execution " in " The Lords Act," 32 Geo. II., cap. 28, sec. 13, has been held to include attachments. *The King v. Davis*, 1 Bos. & Pul., 336 ; and in *Rex. v. Stokes*, Cowp., 137, ASTON, J., said, " An attachment is an execution in a civil suit, and I apprehend it has long since been settled to be so." If the word " execution," which, in common legal acceptation, includes *fi. fa.* and *ca. sa.*, could be construed to include an attachment against the body, the same word ought surely to be construed to include an attachment against goods.

3. From the fact that our statute gives the landlord a right to " a rateable part " of the rent, though it be " not actually due ; " *Revised Statutes*, (4th Series,) chap. 107, sec. 7. *Henchett v. Kimpson*, already cited, decides that the statute gives the landlord " something like a *specific lien*," *i. e.*, a specific lien

with the incident of possession left out. Now, suppose a yearly tenancy, rent payable quarterly, with two months of the first quarter elapsed, and a *fi. fa.* to issue against tenant's goods. The landlord's lien on them would of course secure him his two months rent. Now, when does this lien attach? The only fixed point is the beginning of the tenancy, and no other point in the continuing tenancy can, with the slightest reason, be determined on for the statute to commence to operate. We must conclude that from the moment a tenancy begins, with rent accruing, the statute is ever active, giving the landlord a specific lien on the tenant's goods for the rent from moment to moment. Now if "the contingent, conditional charge," which a levy under attachment gives, can for an instant be called a "lien," what results? The landlord's lien is prior, and gives him the prior right. *3 Parsons Cont.*, 238; *Nathan v. Giles*, at p. 294.

4. From some of the consequences of holding that an attachment is not an execution. If a judgment debtor, who was a tenant owing rent, should abscond, the judgment creditor would not issue execution against his goods, but sue him on his judgment as an absconding debtor, and levy under attachment, and thus defeat the landlord's claim. This would be a virtual repeal of the statute in all such cases, if the attacher is to reap the benefit of his levy. Are the wife and children of an absconding debtor to be bereft of "the bedding, one stove and last cow," which our statute has, in its very tender mercy, exempted from "execution"? Certainly; if the word execution is not to be construed in such cases to include an attachment. But further, I think that such a holding would conduct us to what I may call a legal dilemma. Suppose attachment levied on goods not liable to execution, judgment obtained in the suit, and execution put in Sheriff's hands; what would the Sheriff do with the goods not liable to execution? He does not levy on and sell them. He has no right to hold. What then can he do? This is the legal and logical result of such a decision. What, then, appears to be the true doctrine? Clearly this: that an attachment is limited to goods that are liable to execution. And this without doubt, is the American doctrine. *3 Parsons Cont.*, 275; *Drake on Attachment*, sec. 238; *Pierce v. Jackson*,

6 Mass., 243 ; *Badlam v. Tucker*, 1 Pick., 389, in which WILDE, J., said (p. 399,) " By our laws those goods and chattels which can be lawfully seized on execution, and those only, are liable to attachment. They must be the property of the debtor, and the attaching officer must have a right to seize them, and to hold possession, so that they may be forcibly taken on execution." From these various considerations I submit that an attachment should be considered an execution within the meaning of this statute, and many others, and that the applicant in this case is entitled to relief from the Court to secure her rent out of the goods levied on.

Sedgewick, Q. C., (with Mills).—Our legislature has gone further than the English act, and given the landlord a lien for rent accruing. There is express authority in our own Court that a writ of attachment is a writ of execution. § R. & C., 4. (WEATHERBE, J.—If all you say is correct, it appears to me that the words "execution creditors" distinguish this case.) The words will include attaching creditor. (WEATHERBE, J.—There is no debt. You would not say summons creditor.) The same thing is true of a writ of *capias ut legatum*. (WEATHERBE, J.—It seems to me the legislature refers expressly to cases where a party has a judgment entered up and issues execution. In such case there shall be so much rent reserved. THOMPSON, J.—In England a writ of execution is something different from what it is here. RIGBY, J.—*Rumsey v. Hare* was doubted, though it was never overruled.) If an attachment is not an execution, property may be taken under attachment which cannot be taken under execution.

MCDONALD, C. J.—We need not call upon Mr. Longley. The appeal must be allowed. I confine my judgment to the one point, that the word execution in our statute does not include attachment.

WEATHERBE, J.—Section seven of the act shows clearly that the word execution means process issued on a judgment entered up. So, I think the case is beyond doubt.

Appeal allowed with costs.

CORBETT v. O'DELL.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided February 13th, 1883.)

Jurisdiction of Commissioner to issue certiorari under Acts of 1882, Cap. 10.

A writ of *certiorari* was issued to remove a conviction under the *Canada Temperance Act*. The writ was allowed by a Commissioner, and it was not shown that there was no Supreme or County Court Judge in the County, (Acts of 1882, cap. 10, sec. 2.)

Held, that the writ must be set aside, as it was not shown that the Commissioner had jurisdiction to issue it.

Per McDONALD, C. J., and WEATHERBE, J., that the indorsement, "allowed, security having been first given and filed," was not sufficient."

The defendant having been convicted before the Stipendiary Magistrate of Police District No. 3, Annapolis, for unlawfully selling liquor contrary to the *Canada Temperance Act of 1878*, a writ of *certiorari* was issued to remove the conviction to the Supreme Court at Annapolis.

J. J. Ritchie, (February 12th, 1883,) moved to set the writ aside, on the grounds, 1st, that there was no order for the issue of the writ; *Doyle v. Gallant*, 2 R. & G., 86. 2nd, that it was provided by chapter 10, Acts of 1882, section 2, that Commissioners shall not have authority to allow writs of *certiorari* where there is a Supreme Court or County Court Judge in the County. The affidavits on which the *certiorari* was granted should show that the Commissioner was authorized to issue the writ. 7 B. & C., 785. The power of the Commissioner to grant the *certiorari* is exceptional, and the circumstances under which alone he is authorized to issue the writ must be shown. 6 T. R., 583. The writ of *certiorari* is absolutely taken away by the *Canada Temperance Act*. Sec. 111, chap. 16, Acts of 1878. L. R., 10 Q. B., 587; *Ex parte Hopgood*, 15 Q. B., 121. The writ was improvidently issued. The affidavit is insufficient, the grounds not being sworn to. It is not sufficient in the affidavit to set the grounds forth as objections, "for the following reasons," but the truth of the grounds should be sworn to. *Queen v. Manchester and Leeds Co.*, 8 A. & E., 417. The *Canada Temperance Act* incorporates with it the *Summary Convictions Act*, under which service may be effected on any one on the premises.

The endorsement on the writ does not follow the statute, by showing that bail was filed. What it says is "allowed, security having been first given and filed." Security is not necessarily bail. The endorsement does not show that bail was filed. (THOMPSON, J.—I think it would be sufficient if the endorsement said "security according to law.") There should have been an endorsement showing the date on which the writ was allowed.

Graham, Q. C.—The writ has been allowed by the Commissioner in accordance with the statute. There is a marked distinction between an order and a conviction. The Commissioner has as much jurisdiction in this case as a Judge, and the presumption is that his acts are rightly done. The act enabling Justices to try men criminally is in derogation of a man's common law rights, and must be strictly construed. *Paley on Convictions*, 159. It should not be assumed that the security given was different from that required. Cites *Cummings v. Brown*, 2 R. & C., 303.

MCDONALD, C. J.—We are all of opinion that the rule must be made absolute. My opinion is based on two grounds, 1st, that it was necessary to show jurisdiction; and 2nd, that the endorsement of the writ was not sufficient.

WEATHERBE, J.—I think the endorsement was not in compliance with the statute. It is not necessary to give an opinion on any other point.

RIGBY, J.—I think the writ must be made absolute, on the ground that the writ of *certiorari* should not have been allowed until it was first shown that there was no Supreme or County Court Judge in the County.

THOMPSON, J.—My opinion is based on the want of jurisdiction.

BANK OF NOVA SCOTIA, ASSIGNEE OF THE BANK
OF LIVERPOOL, v. SMITH.

Before McDONALD, C. J., McDONALD, SMITH and JAMES JJ.

*(Decided February 13th, 1883.)**Transfer of Bank Stock. Action for Calls. Agreement not to transfer. Transfer not assented to by Directors.*

To an action for calls on stock held by defendant in the Bank of Liverpool, defendants pleaded an equitable plea, setting up that before said calls were made or notice thereof given, the defendant had made, in good faith and for valid consideration, a transfer of the stock to a person competent and authorized to receive the same, and the defendant and said transferee had done all things necessary for the valid and effectual transfer of said stock, but the plaintiff without reasonable excuse had refused to record the transfer, &c. The shares were sold by the defendant in October 1877 to Almon & Mackintosh and a power of attorney given by defendant to the manager of the Bank authorizing him to transfer the shares, and the stock certificates, together with the power of attorney, were delivered to Almon & Mackintosh who transmitted them to the manager with a letter referring to the enclosures and adding, "If you cannot complete transfer please note enclosed and hold until you decide to do so, * * * you can consider us as holders of the stock." The shares were not transferred on the books of the Bank, and the directors did not accept or recognize the transfer, but refused to record it. Some years before the attempted transfer the Bank had suspended specie payments, and it became a question whether the Bank should be wound up. At a special meeting a resolution was passed that the Bank should not go into liquidation and that the shareholders agree to hold their shares without assigning them until the principal and interest due on a loan, for which the resolution provided, should be paid. This resolution was communicated to the defendant, and defendant became bound to one of the sureties for the loan, for a proportionate amount of the liability. Defendant swore that he had heard of the resolution, but was not aware of its precise nature. The loan was not repaid at the time of the alleged transfer, but defendant had been released from his bond.

Held, That the defendant was liable for the calls sued for.

JAMES J., dissenting.

This was an action brought by the Bank of Liverpool against the defendant to recover the sum of two hundred and fifty dollars, being a call of ten dollars per share on twenty-five shares in said bank of which defendant was alleged to be the holder. The Bank of Liverpool became insolvent after the commencement of the action, and the Bank of Nova Scotia, as assignee, was allowed to intervene to carry on and prosecute the suit against the defendant.

A number of pleas were pleaded by defendant, but the one chiefly relied on was the following,—

7. And for a seventh plea and for defence on equitable grounds, the defendant says that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in

the capital stock of the said Bank of Liverpool to a person authorized and qualified to receive the same, and the defendant and the transferee of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiff, without reasonable or legal excuse and without reason, refused to record such transfer or register the same in the books of the said bank, or to recognise the said transfer. And the defendant prays that the said Bank of Liverpool shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of Liverpool be enjoined from the further prosecution of this suit.

The cause was tried at Halifax before Mr. Justice JAMES, without a jury, who, being of opinion that on the evidence the equities of the case were with the defendant, found a verdict in defendant's favor, with leave to the plaintiff to apply for a rule to set the same aside. All the material portions of the evidence on the trial appear in the headnote. The cause now, (July 25th, 1881,) came up for argument on a rule obtained in pursuance of the leave given by Mr. Justice JAMES, as above stated.

Ritchie, Q. C.—The transfer must be accepted on the book of the bank and registered. The transfer and acceptance must be on the book before it can be registered. The registering of the transfer is not the act of the bank. The transfer must be accepted by the transferee before it can be registered. Almon & Mackintosh are not liable, because they have never accepted the transfer. The whole question here is whether there is anybody to represent that stock or not. If there is any person it must be the defendant. *Dominion Acts 1871*, chapter 5. The directors had a right, under the resolution passed by the general board, to refuse to accept the transfer. Both Smith and Mackintosh knew that the transfer would not be made when they sent it down. The letter of October 27th, 1877, shews that Mackintosh knew it would not be accepted. Mr. Smith's letter of February 6th, 1879, shews the same knowledge on his part. He would not have taken a document from Almon & Mackintosh assuming all liability.

Attorney-General, contra.—There is a distinction between the transfer required by common law and the transfer required by the act. The transfer at common law has been completed, and the statutory transfer has only not been completed in consequence of the negligence of the bank. The equitable defence is therefore perfect, as the plaintiffs cannot take advantage of their own wrong. The shares are transmissible and assignable by parol at common law. Section 19 of the act makes them personal property. *Angell & Ames on Corporations*, section 564. The manager of the bank received a power of attorney from Smith to accept the stock, also a power of attorney from defendant to transfer it, and defendant's certificate of stock. The directors refused to record the transfer. The manager wrote to Almon & Mackintosh that when the vessel "J. Scott" was launched the transfer would be registered. The vessel was launched and the proceeds remitted to the bank. Everything but the statutory provision had been complied with. The book in which the statute requires the transfer to be made is the book in evidence, and that book was under the control of the bank. The officers of the company in such a case were bound to accept the authority and make a transfer in the books, 9 *U. C. Q. B.*, 333; *Sedgwick on Damages*, 367; *Angell & Ames on Corporations*, section 381; 10 *Johnson's Reps.*, 484. Where the directors unduly refuse to complete the transfer the courts will give relief as necessary, and will alter the list of contributors. *Brice on Ultra Vires*, p. 36; 6 *C. B. N. S.*, 336; 2 *M. & G.*, 706; 3 *Scott's N. R.*, 68; 2 *R'wy Cases*, 504; 35 *Beavan*, 79; *L. R.*, 1 *Eq.*, 32; *L. R.*, 2 *Eq.*, 226; *L. R.*, 3 *Eq.*, 77, 84; *L. R.*, 6 *Eq.*, 238; *L. R.*, 9 *Eq.*, 589; *L. R.*, 16 *Eq.*, 559; *L. R.*, 4 *Ch. Ap.*, 207, 292, 768, 769 note; 8 *U. C. C. P.*, 263; 11 *U. C. C. P.*, 534; 24 *U. C. C. P.*, 761.

The resolution is invoked as justifying the stockholders in refusing, but they gave a different reason to the parties, and therefore are estopped from setting up the resolution. If they intended to set up the resolution as an answer they should have notified the parties to that effect and sent back the papers. They did not do so, but kept the papers until the trial. The resolution does not bind the defendant. It was only a resolution binding those who were present. It is

in the form of an agreement, and can only bind those present and parties to the agreement. We took the objection that the minutes of the meeting were not evidence against the defendant, as he was not present; that evidence should not therefore be considered. If it was intended to be relied on it should have been replied. The equity as to the loan is met completely, as Black, the only party injured, gave up Smith's bond and took Almon & Mackintosh's. By the transfer he has been injured instead of being benefited. The *laches* of the plaintiff in keeping the transfer papers until the defendant's position was changed by the insolvency of Almon & Mackintosh estops them. They are also estopped by undertaking to complete the transfer when the vessel was launched. There is evidence that the loan was paid. After the resolution passed the directors completed on the books eighteen transfers for other people, twenty shares having been transferred from a man who is yet solvent to one who has become insolvent.

Ritchie, Q. C.—The cases cited *contra* are not applicable as the act is different, requiring a transfer on the books. The resolution on the books of the bank against assigning shares justified the bank in refusing to assent to the transfer in this case. McCully was present by proxy at the meeting and was bound by it, even if Smith's contention that he was not bound can prevail. There is no evidence that the loan was paid. The fact that Black released Smith from the bond does not affect the matter, as there were other shareholders.

MCDONALD, C. J., now, (February 13th, 1883,) delivered the judgment of the Court:—

The defendant, Mr. Edward Smith, of Halifax, became the owner of twenty-five shares in the Bank of Liverpool by purchase from Jairus Hart, on the 26th September, A. D. 1872, and continued to stand as a stockholder for these shares on the books of the bank till the insolvency of that institution in July, 1879. Subsequent to his purchase of this stock the defendant paid three calls made on the shareholders in respect thereof, viz :

5 per cent.	on the 13th January, 1874.
10	" " 9th November, 1874.
10	" " 25th March, 1875.

Another call of ten per cent. was made on the 30th of January, 1879, and the defendant having refused payment, this action was brought to recover the amount. Several pleas were pleaded in reply, but the substantial defence as relied upon at the trial and argument is set out in the seventh plea pleaded on "equitable grounds." That plea is as follows:

7. And for a seventh plea and for defence on equitable grounds, the defendant says that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf a transfer and assignment of all the shares and stock which he had held in the capital stock of the said Bank of Liverpool to a person authorized and qualified to receive the same, and the defendant and the transferee of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock, but the said plaintiff, without reasonable or legal excuse and without reason refused to record such transfer or register the same in the books of the said bank or to recognize the said transfer. And the defendant prays that the said Bank of Liverpool shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of Liverpool be enjoined from the further prosecution of this suit.

The *English Joint Stock Companies Act of 1862* provided a sure way and convenient mode of determining controversies as to the title to stocks of this character, and the liability to contribute in respect thereof, and several cases under that act were cited at the argument. The 35th section of that act provided that "if the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may * * * by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application to a Judge at Chambers * * * by summary petition, apply that the register may be rectified." This

summary process is not available here in respect to banks constituted under the provisions of the *Banking Act of 1871*, and the remedy so readily provided under the English procedure is attainable here only by bill in equity, or, perhaps, in some cases by writ of *mandamus*. In the case before the Court the defendant, by virtue of section 162 of our *Practice Act*, which provides "that the defendant in any cause in the Supreme Court in which if judgment were obtained he would be entitled to relief against such judgment on *equitable grounds*, may plead the facts which entitle him to such relief by way of defence," invokes the equitable jurisdiction of the Court in his favor, and prays that, on the facts stated in his plea, the Court may declare that the Bank of Liverpool shall be compelled and decreed to make and complete the said transfer and do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of Liverpool be enjoined from the further prosecution of this suit. The facts in evidence are substantially as follows:—The defendant being, as I have said, a shareholder of the Bank of Liverpool, alleges that on the 27th October, 1877, he sold the twenty-five shares owned by him, the par value of which was one hundred dollars per share, and of which eighty-five per cent was paid up, to Messrs. Almon & Mackintosh, then brokers in the City of Halifax of good standing and credit, for one dollar per share. In pursuance of this sale and to enable the shares to be transferred to the purchasers on the books of the bank, the defendant, on the said 27th October, executed a power of attorney to Leslie, then the Manager of the Liverpool Bank, authorizing him to transfer the shares. He delivered this power of attorney with his stock certificates to Mackintosh, one of the firm of Almon & Mackintosh, who on the same day transmitted them by mail, with a power of attorney from Almon & Mackintosh to accept the transfer to Leslie at Liverpool. The latter, it appears by the evidence, received the papers in due course, covered by the following letter:—

HALIFAX, 27th October, 1877.

The Manager of the Bank of Liverpool :

Dear Sir,—* * * We enclose for transfer power of attorney from E. Smith, and certificate of twenty-five shares,

If you cannot complete transfer, please note enclosed and hold until you decide to do so. We should very much like that the transfer could be completed, but you can consider us as holders of the stock.

Yours, &c.,

ALMON & MACKINTOSH.

The shares were not then nor have they since been transferred on the books of the company, nor did the directors, before the insolvency of the bank, accept or recognize the transfer. The following is the evidence with reference to that point. Leslie says: "I remember receiving a transfer of defendant's stock; I received a power of attorney from Almon & Mackintosh authorizing me to accept the stock, and also a power of attorney from the defendant to transfer it to Almon & Mackintosh, also the defendant's certificate of stock for twenty-five shares; the whole was to be transferred to Almon & Mackintosh; these are the papers; * * they were sent to me by mail by Almon & Mackintosh; they remained in my possession as manager of the bank until I handed them to the assignee after the insolvency of the bank; it appears by the record of transfers that transfers of stock were usually recorded by the cashier under power of attorney from the person making the transfer; there was no other mode of transfer in the bank except this book; no other book containing registration of transfers; I believe the directors were aware of this application to transfer defendant's stock; I read them the letter from Almon & Mackintosh; *I did not make the transfer in the books on these papers, nor did Mr. Stearns*; I do not recollect when I gave notice to defendant of the refusal to transfer; the directors *refused to record the transfer*; I am not aware that the refusal was ever communicated to the defendant; * * * there was no claim or demand of the bank against defendant when the application for the transfer was made." By section 19 of the *Banking Act of 1871*, "no assignment or transfer shall be valid unless it be made and registered and accepted by the party to whom the transfer is made in a book or books to be kept by the directors for that purpose."

It would seem from some of the papers in evidence, although the evidence on that point is not very full, that

about the year 1873 the Bank of Liverpool became so embarrassed as to be obliged to suspend specie payments, and it then became a question with the directors and shareholders whether the institution should not be wound up in insolvency. On the 26th June, 1873, a special general meeting of the shareholders of the bank was held at Liverpool, at which the following resolution was passed:—

“Resolved, That in the opinion of this meeting, the Bank of Liverpool should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, as a security for such loan, and to execute when required a bond to that effect.”

On the 28th January 1874, following, at the annual general meeting of the stockholders, the directors in their official report to the meeting communicated this resolution to the shareholders, and informed them that in accordance with and under authority of that resolution an arrangement had been made with the Bank of Nova Scotia for a cash credit to the extent of \$80,000 (eighty thousand dollars), to be re-paid in six, twelve and eighteen months, and that this credit was obtained only with the assistance of C. H. M. Black, who with others of the shareholders became surety for \$60,000 (sixty thousand dollars) of the above credit. The defendant was himself one of those shareholders, and gave his bond to Black on the 9th July, 1873, in the penal sum of \$2,000, conditioned to pay one-sixtieth of any sum Black should ultimately be obliged to pay the Bank of Nova Scotia on his surety for the \$60,000. The defendant was not at the special general meeting in June, 1873, and with reference to it says in his evidence: “I may have heard of the resolution, but did not know of its precise nature.” It is evident, however, that his bond to Black was the result and consequence of the resolution of June, 1873, and the recital of that bond is substantially the resolution itself, so that I cannot doubt that Mr. Smith was fully informed of the proceedings of the special meeting at which the resolution was passed, and of the general meeting at which it was afterwards affirmed.

After this date, and with the knowledge he then possessed of the financial position of the bank and of the obligations incurred for its relief, the defendant paid the several calls above mentioned, and in all things continued to be recognized as a shareholder and to act as one. The debt thus incurred to the Bank of Nova Scotia, and for part of which Black became the surety of the Bank of Liverpool on the faith of the resolution of June, 1873, was not paid at the time of the sale of stock to Almon & Mackintosh, had not been paid at the time the directors refused to register or sanction that transfer, and so far as the evidence shews, has not yet been paid. I do not stay now to inquire how large is the discretion as to refusal to transfer stock, conferred on the directors of banks under the act of 1871. That it is intended in the statute that they should possess and exercise a discretion and control in the acceptance and registration of transfers cannot be doubted, as the Legislature cannot be supposed to have rendered stock invalid till registered without motive and as a mere matter of form. In the cases cited at the argument under the English act the requirements of the deed of settlement or by-laws regulating the transfer of shares had been strictly complied with by the vendor seeking relief, and the principle running through all these cases and on which the decisions rest is that the company is bound to register without unreasonable delay *where they have no reasonable cause for refusal*, and that if such reason exists it must be communicated to the party seeking to make the transfer. In *Nation's Case*, 3 L. R. Eq., a leading case on the subject, Lord ROMILLY, M. R., said: "I fully admit, and in fact that was what I intended to decide in *Sheppard's Case*, that if a company find they are in a situation in which they cannot go on, if they are of opinion, after proper investigation of the state of their affairs, that it is necessary to wind up, and that it is but fair to all the persons connected with the company that matters should remain in *statu quo*, then they may come to a resolution that they will allow no transfer to be registered after that date." In the case before the Court the resolution not to register is not the mere act of the directors alone, but that of the general body of the shareholders, and constitutes an instruction to the directors which it would have been a gross breach of faith in

them to violate. Under that resolution the corporate body as well as the individual members thereof contracted large liabilities to the Bank of Nova Scotia, to Mr. Black, and to each member of the body of shareholders. The refusal to register the proposed transfer was therefore an act authorized by and made imperative upon the directors by the general body of the shareholders, of which the defendant was one. If Mr. Smith, after the adoption of that resolution by the shareholders and the subsequent action of the directors under its authority, could be allowed to repudiate it and sell his shares to escape further liability, so could each and all of his fellow-stockholders. How then was the debt to the Bank of Nova Scotia to be met, and what of the interests of the other stockholders who had adhered to their engagement not to assign? Surely the maxim that "he who seeks equity must do equity" meets the defendant on the very threshold of his case and says to him with great emphasis that before he can be allowed to discharge himself of responsibility by a sale of this stock, he must shew that the obligations attaching to it, incurred with his consent and concurrence, and on the faith that he should continue to be a member of the corporation, have been met, and that the resolution referred to ought in equity to be rescinded. The defendant appears to have recognized this principle to some extent when he procured a release of his bond from Mr. Black, that the liability to Black was only a part of the obligation imposed on the stockholders by that resolution. That of the bank and of the shareholders in the event of the insolvency of the bank remained, and the directors were bound to preserve the security pledged while any part of the liability for which it was so pledged remained unsatisfied.

There is no evidence that the release from Black was with the knowledge or concurrence of the directors or other shareholders, and without such consent no agreement between Black and the defendant could relieve the latter or authorize the directors to sanction the transfer. The bond to Black, it must be remembered, covered only the contingent liability of Black for \$60,000 of the \$80,000 to be advanced by the Bank of Nova Scotia, leaving still the balance of \$20,000 to be provided for. If the observation of the Master of the Rolls.

in *Nation's Case* be law, as well as common sense and common honesty, applied to a resolution of the directors alone looking to the welfare of all interested, surely they apply with irresistible force when such a resolution is adopted by the directors by express authority of the shareholders themselves, and to allow any of these shareholders to violate their undertaking would be a gross disregard of the plainest principles of law and equity.

But further, has the proof in a more technical sense sustained the defendant's plea that the defendant did all things necessary for the valid transfer of the stock? Whatever doubts as to his right to transfer this stock may have been entertained by the defendant we have no means of judging, but it is clear that some difficulties were suggested to Almon & Mackintosh, whose letter to Leslie contains this sentence: "If you cannot complete transfer, please note enclosed, and hold until you decide to do so." It is plain that in the opinion of the writer some reason existed why he could not then expect the directors of the bank to assent to the transfer. The defendant himself had no communication with the bank or with Leslie until the latter end of January, 1878, when he received the usual circular transmitted to the shareholders after the annual meeting. He then wrote to Leslie the letter in evidence, to which he received no reply. Nothing further was done by either party till 6th February, 1879, when the defendant was called upon to pay the call made on the 30th January previous, a demand which was replied to by the letter of Messrs. Thompson & Graham, and which appears to be the first intimation to the bank of the assent of Black to the sale to Almon & Mackintosh. By the *Banking Act* the capital shares of the bank shall be held and adjudged to be personal estate, and shall be transferred at the bank. The shares of the capital stock of the bank shall be held and adjudged to be personal estate, and shall be assignable and transferable at the chief place of business of the bank, or at any of its branches which the directors shall appoint for that purpose, and according to such form as the directors shall prescribe; but no assignment or transfer shall be valid unless it be made and registered, and accepted by the party to whom the transfer is made, in a book or books to be kept by the

directors for that purpose, nor until the person or persons making the same shall, if required by the bank, previously discharge all his, her or their debts or liabilities to the bank, which may exceed in amount the remaining stock, if any, belonging to such person or persons valued at the then current rate.

As between the defendant and Almon & Mackintosh the sale of these shares may have been complete by the payment of the purchase money and the delivery of the stock certificate, but it is, I think, reasonable that the bank directors should require other evidence of sale and transfer of this property than a mere power of attorney to transfer and accept in their books. "They shall prescribe the forms of transfer." Has that form been followed in this case? In one respect it is clear it was not, as no entry whatever was made by Leslie in the transfer book. He did not enter in that book either the transfer or acceptance. The books were accessible to Leslie, the agent of the parties, but he made no entry or record of the transfer or acceptance therein upon which the directors could determine in a formal and official manner their decision on a proposition made by them.

By the statute already referred to "no assignment or transfer shall be valid unless made and registered and accepted in a book," &c. In *Shipman v. Aetna Insurance Company*, 29 Conn., 245, cited in *Angell & Ames*, 582, a by-law was duly established which required that all transfers of stocks should be made by assignment on the treasurer's book, either in person or by authorized attorney, &c. No assignment was made on the book. No certificate of ownership was surrendered or new ones received, and nothing was done but the giving of the credit of the amount of the shares on the treasurer's book to the successive holders. SWIFT, C. J., said: "Though the form of the assignment is not pointed out, yet the by-law on its fair construction requires that there must be a written assignment on the treasurer's book, subscribed by the assignor or by his authorized attorney, to constitute a transfer of the stock." And the same author, at section 577, says: "A sale or pledge of stock accompanied by a letter of attorney to make the transfer, where the regulation is that no transfer shall be valid till received for record, is of no

avail in Connecticut to convey a title until the transfer is received for record." In my opinion no transfer was in the case before the Court submitted to or received by the proper authorities of the Bank of Liverpool for record, and there is no contention that such was the case, unless we hold that the loose and informal conversation between Leslie and the directors of the bank, when he informed them of the receipt of the letter and powers of attorney from Almon & Mackintosh, is sufficient evidence of the allegation in the defendant's plea that he did all things that were necessary for the final transferring of the said stock. The acceptance must be the act of the board of directors, and not of one or more of the individuals composing the board. Where the deed requires that a transferee of shares should be approved of by a board of directors, the approval certificate, although signed by a proper portion of directors, is insufficient if not given at a board, and the transferor still remains a shareholder. 4 *Exch.*, 699; 26 *L. J. Chan.*, 545; *Thompson on Liability of Shareholders*, sections 211, 212. The act (of transfer) must be so done as to assume a formal and authentic shape under the official cognizance of the officers of the institution. The regulations of the corporation in the premises, unless unreasonable, must be complied with. *Morse on Banks*, 513. Surely these observations are as applicable to the requirements of our statute as to the by-laws or regulations of corporations. In my opinion, therefore, the defendant has not made out a case which will enable us to hold that the bank directors unreasonably, without legal excuse and without reason, refused to register this transfer. From the view which I have taken of the case I do not think it necessary to enter upon the enquiry, which might otherwise be of considerable importance, namely, the extent to which this Court, under the authority of decided cases and in view of our own legislation as to the equitable jurisdiction of this Court, could afford relief to the defendant under the equitable plea pleaded by him, did the evidence warrant such relief. For the reasons stated I am of opinion that the defendant has failed to substantiate his defence, and that the verdict in his favor must be set aside with costs.

SMITH, J., concurred.

MCDONALD, J., was not present when judgment was given, but it was announced that he, also, concurred.

JAMES, J., delivered the following dissenting opinion:—
This is an action continued and sustained by the plaintiff as assignee of the (insolvent) Bank of Liverpool for the amount of call of ten dollars on each of twenty-five shares in the capital of the company held by him. By the 7th plea “and for defence on equitable grounds the defendant says that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf a transfer and assignment of all the shares and stock which he had held in the Bank of Liverpool to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiff, without legal excuse and without reason, refused to record such transfer or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said Bank of Liverpool shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of Liverpool be enjoined from the further prosecution of this suit.” The cause was tried before me without a jury at the Spring Sittings, 1880, and the following verdict given:—“I am clearly of opinion that the equities of the case are with the defendant, and find a verdict in his favor, giving the plaintiffs an opportunity to apply for a rule *nisi* to set it aside should they desire a fuller consideration of the law than I can give to the case under the circumstances.” It was objected by defendant’s counsel at the argument that if there were facts justifying the directors in refusing the transfer they should have been replied, but, as this objection was not taken at the trial where it could have been remedied by an amendment on reasonable terms, without deciding as to the validity of this objection I do not think it should obstruct the plaintiffs at this stage. Undoubtedly the plea puts the plaintiffs upon proving that the refusal was

based upon something more than their mere caprice, or unjust discrimination against the defendant.

The principal facts of the case were as follows:—The defendant, being the owner of twenty-five shares of the stock, sold them to Almon & Mackintosh in October, 1877. On the 27th of that month, the defendant and Almon & Mackintosh, respectively executed powers of attorney to “John A. Leslie, Manager, of Liverpool,” the one to “transfer” and the other to “accept” the shares so sold. These powers were sent with the defendant’s certificates of the stock to “the Manager Bank of Liverpool, Liverpool,” by Almon & Mackintosh, to whom they had been delivered by defendant, enclosed in their letter dated 27th October, 1877, as follows:—

“DEAR SIR,—We beg to acknowledge receipt of yours of ———, with enclosure as stated. We enclose ‘for transfer’ power of attorney from E. Smith and certificate of twenty-five shares. If you cannot complete transfer please note enclosed until you decide to do so. We should like very much that the transfer could be completed, but you can consider us as holders of the stock.”

These papers were in due course received by the manager, Mr. Leslie, and the letter read to the directors, who “refused to record the transfer,” and the transfer, so far as the action of the directors and officers of the bank was concerned, was never made. The papers were retained by Mr. Leslie “as manager of the bank” until after the insolvency of the bank, when they were handed to the assignees. No notice of the refusal of the directors to transfer the stock was ever sent to defendant. The first suspicion he ever had of the failure to carry out the transfer was at the end of January, 1878, when he received a notice of a meeting of shareholders, and on February 15th, 1878, he wrote to the manager for an explanation, and asking if not yet done to do so at once; but it was not done. The evidence is ample that in all 1877 the credit of Almon & Mackintosh was excellent and continued good until March, 1878, at or after which time they went into insolvency. On 20th January, 1879, a call was made on the shareholders of ten per cent, and notice of the call was

sent to defendant as a shareholder, for the amount of which call this action is brought.

Passing by for the present the question whether there was any such legal assignment as to relieve defendant from calls, I shall now state the facts relied on by defendant under the equitable plea. The bank being in some difficulty, a special general meeting of the shareholders was held at Liverpool on June 26th, 1873, when the following proceedings were taken :

“BANK OF LIVERPOOL,
Liverpool, N. S., June 26, 1873. } ”

At the special general meeting of the shareholders of the Bank of Liverpool held pursuant to notice on the above date in their office, and thence adjourned to the County Court House ; Moved by Chas. H. M. Black, Esq., and seconded by John W. Barss, Esq.,—*Resolved*, that in the opinion of this meeting the Bank of Liverpool should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid as a security for such loan, and to execute when required a bond to that effect. Passed unanimously.”

We have also before us minutes of the next annual general meeting on 28th January, 1874, shewing that a report was made by the directors as follows :—

“ In accordance with the resolution ” (as above) “ arrangements were made with the Bank of Nova Scotia for a cash credit of \$80,000, to be re-paid in equal instalments in six, twelve and eighteen months. This credit was obtained only with the assistance of C. H. M. Black, Esq., who, with others of the shareholders, became sureties for \$60,000 of the loan.”

The evidence of the proceedings of the meeting of 26th June, at which the resolution was passed, was objected to at the trial, and the objection insisted upon at the argument, and, as there is no proof of the calling of the meeting, the objection, I think, should be sustained. At the annual meeting the resolution was not confirmed, but the facts connected with it were stated in the report of the directors in

the above words. Assuming, however, that it was properly before us, it appears that defendant knew of it, for he gave his several bond of indemnity to Mr. Black for \$1,000 of the \$60,000 for which the latter became surety. This bond was released by Black before the transfer of the shares, but there was a balance of \$20,000 of the loan unsecured, which, or part of it, remained unpaid. There is distinct evidence that this balance was expected to be paid off, without calling on the shareholders, by sale of a vessel. Now, was this an obligation on the part of Smith to the bank? I think not. That it was an obligation of the bank is clear, but it was not an obligation of the shareholders individually in any other sense than the general obligation to pay calls to liquidate debts of the corporation, for it is, (admitting it to be proved,) not at all in the character of a by-law, but merely a recommendation to the shareholders to co-operate with the directors and Mr. Black in procuring the loan. That this was the light in which the Bank of Liverpool, the plaintiff in this cause, regarded it is evident from the fact that after the resolution and before the suspension of the bank the directors, if they believed this to be binding on them, dishonestly sanctioned and registered no less than eighteen transfers, covering two thousand and ninety-one shares. Admitting that the defendant was under a moral obligation to assist in paying the debt by voluntarily continuing to hold his shares and pay calls, was he not discharged from that moral responsibility by this grossly fraudulent conduct of the plaintiff, and is it any wonder that he was anxious to get rid of his stock under these circumstances? The directors in their report say that the loan was obtained through Mr. Black and *others of the shareholders*. This shews that it was not considered by them as obligatory on all the shareholders. I am satisfied that it was looked upon all round as a voluntary thing on the part of the shareholders and not intended to be binding. If it was so intended, the defendant was, morally at least, discharged by the fraud of the plaintiffs. If the defendant was even morally bound, in what respect did he violate his moral responsibility in seeking to assign his shares? Had he assigned to persons who were insolvent or of no credit it is no more than any shareholder of any company may do at any

time. It would have created no legal or equitable responsibility, but it might in that case have appeared as if he wished to save himself at the expense of the other shareholders. Even this appearance he avoided by assigning to parties doing a large business and in the best of credit,—parties whose standing appears to have been above suspicion, and whose ability to pay subsequent calls was indubitable. The defendant, in his evidence, says: “They continued good until March, 1878; I believed them perfectly solvent at the time; I was at the board,—(he was a director of the Union Bank of Halifax,)—discounting for them daily.” And Hon. J. McDonald says: “I am a broker in Halifax; in 1877 the standing of Almon & Mackintosh was considered first-class; no firm in Halifax I would sooner sell stock to; they bought and sold a good deal of stock.” He was not cross-examined. Why should not the defendant sell his stock to them? The directors gave no reason for their refusal. They did not inform defendant of it but they kept certificate and powers of attorney at the bank in possession of their manager, and the defendant did not hear of it until he got a notice of a meeting of shareholders in January, 1878, followed immediately by a call for the amount of which this suit is brought.

These are the facts; what is the law? The *Banking Act of 1871*, section 19, says: “No assignment or transfer shall be valid unless it be made in a book or books to be kept by the directors for that purpose, nor until the person or persons making the same shall, *if required by the bank*, previously discharge all debts or liabilities due by him, her or them to the bank which may exceed in amount the remaining stock, if any, belonging to such person or persons.” Here we have in a few very simple words the duties of the bank and the defendant towards each other prescribed by the law. It cannot be denied that independently of this the defendant could sell his stock as he would sell his house or any other chattel to whom and when and where he would. This statute restricts him to this extent and no more, that if he owes the bank and they choose to insist on his paying his obligation before getting his transfer made, he must do so, but if they do not see fit to require him to do so, they are bound to record his transfer though he may be in debt to the bank.

Here they not only did not require him to discharge any obligation, but there was none to discharge, either legal, equitable, or, as I consider, moral. But no matter how many or great they were, defendant had a right to have his shares transferred, unless the directors saw fit to require him to discharge them, not even if his notes were lying dishonored in the bank at that moment. The requiring payment was a condition precedent to the legality of their refusal. Surely this a just and reasonable enactment. In my opinion, therefore, the defendant is entitled to relief under his equitable plea, which is, I think, sustained by the evidence. But my attention has been called by His Lordship the Chief Justice to a class of cases decided in the English common law courts on the subject of the power of these courts to entertain the equitable plea. These cases were not cited at the argument, nor was it contended that this court is deficient in jurisdiction to grant the relief prayed for in the plea. But we must take notice of and give effect to all decisions affecting our jurisdiction. The English statute on the subject, *Common Law Practice Act, 1854*, section 83, is the same as our statute, *Revised Statutes*, chapter 94, section 162, and an abstract of the cases is given in the notes to *Harrison's Common Law Practice Act*, second edition, 169.

Wodehouse v. Fairbrother, 5 El. & Bl., 277. Demurrer to equitable plea. Plea not held good unless the facts which would in equity entitle the defendant to a decree are such that the common law judgment "that defendant go without day" would do complete and final justice between the parties. Lord CAMPBELL, C. J., p. 288, (delivering the judgment of the Court):—"We are of opinion that *as yet* the Legislature has authorized us to receive a plea disclosing equitable grounds of relief only where the facts would entitle the defendant to an absolute and perpetual injunction against plaintiff. But if the injunction is to be temporary or conditional in equity, at common law *we have no such judgment* and *we have no analagous judgment.*" 8 E. & B., 313, *Gee v. Smart*. Held on demurrer that the plea disclosed facts which would entitle defendant to an absolute and perpetual injunction, and was therefore good as an equitable defence under the *Common Law Practice Act*, section 83. COLERIDGE, J., p. 318, (delivering

the judgment of the Court):—"The question is, however, whether this is such a plea as under the 83rd section of the *Common Law Practice Act 1854*, we are authorized to receive, and several cases have decided that to make it such the facts it discloses must entitle the defendant to an absolute and perpetual injunction against the judgment which the plaintiff might otherwise have obtained at law." The Court considered that the facts set out by the plea were sufficient in this case, and gave judgment for defendant.

Now it is true that the defendant in this case has in the first place "set out the facts in his plea" as required by the statute, and then, at the foot, asked for a remedy by praying that the bank should be compelled to make the transfer, and be enjoined from the further prosecution of the suit. This prayer is no part of the plea, which is complete and perfect without it. He is only required by the statute to "plead the facts." If he has done so and we sustain the plea on the evidence, the defendant has no occasion to ask us to go further, for he has got all that can do him any good. He requires nothing more from us than the common law judgment "that he go without day," which will effectually prevent the plaintiff from proceeding further with the suit by putting a final end to it. If we hold that a Court of Equity on these facts should perpetually and unconditionally enjoin the plaintiff from proceeding with the suit we have simply to give judgment for the defendant, as was done in *Gee v. Smart*, and this will satisfy the English cases. We ought not to refuse to defendant what the law gives him, because he has asked for something which we cannot give him.

In making these observations I by no means wish to be understood as deciding that this Court has not power to enforce an equitable plea by all the methods available to a Court of Chancery. Up to the passing of the *Revised Statutes*, (Second Series,) in 1859, this Court had no equitable jurisdiction except a summary process for the foreclosure of mortgages. The Chancery jurisdiction was until that date administered by the Master of the Rolls, with an appeal to the Lieutenant-Governor, who was the Chancellor, and who sat on appeals with the Master of the Rolls and a Judge of this Court; but this Court, as such, had no Equity jurisdiction.

By chapter 127 of the Second Series the Court of Chancery was abolished and the whole Equity jurisdiction given to this Court, and from that day to this the Supreme Court has been not only a Court of Equity but the highest and indeed the only Court of Equity in the land. The powers then given to this Court have never been withdrawn or repealed, and without express words they could not be withdrawn or repealed. The Judge in Equity is a Judge of this Court and liable to perform all the functions of a Judge of this Court when it may be necessary for him to do so. And the Judges of this Court are all Judges in Equity whenever the necessities of the case require them to exercise their powers, which necessity is occurring every day. All the proceedings in Equity are headed "In the Supreme Court," and the Judge in Equity, sitting for judicial business, is not a separate court but the Supreme Court sitting for the transaction of equitable business by one of its Judges appointed for that special purpose. Even in the English Common Law Courts which had then no Equity jurisdiction, the difficulty of the Judges seems to have been rather a want of suitable procedure to enforce equitable decrees than a want of jurisdiction. (See extracts above.) They had no jurisdiction because the statute had not given procedure. But here we have both ample jurisdiction given us by statute, and in chapter 25, section 7, and twenty subsequent sections we have an ample code of procedure given, not to the Judge in Equity by name, for he is not mentioned in any one of those twenty sections, but to the Supreme Court by name.

Now I cannot help thinking that our Legislature, in giving the equitable plea to a Court having Equity jurisdiction and ample procedure, meant a very different thing from giving the same plea to courts having no previous Equity jurisdiction, and providing no procedure to carry out their decrees. Therefore the courts refrained, until further legislation took place, (see Lord CAMPBELL above in *Wodehouse v. Fairbrother*) from exercising that jurisdiction except in cases and to the extent which their procedure enabled them to carry out, and in this spirit, in one of the cases I have cited, they dismissed the plea, because, the Legislature not having "as yet" given them procedure, a simple judgment upon it would not be

sufficient to do justice, and in the other, where a simple decision against the plaintiff would give the defendant sufficient redress, they allowed the plea. The case before us is of the latter character. It is simply a suit for money, and if we give the defendant the common law judgment "that he go thereof without day," we give him perfect redress.

I think there should be, as in *Gee v. Smart*, "judgment for the defendant," of course with costs.

DEVERS v. GAVAZA.

Before McDONALD, C. J., and WEATHERS, RIGBY and THOMPSON, JJ.

(Decided February 13th, 1883.)

No Return Day in Writ of Certiorari.

Writ of certiorari quashed and *procedendo* awarded where there was no return day mentioned in the writ.

In this case a writ of *certiorari* issued to remove to the Supreme Court a conviction made against the defendant by two Justices of the Peace for the County of Annapolis.

Meagher, Q. C., (February 12th, 1883,) moved to make absolute a rule to quash the writ of *certiorari*, and for a *procedendo*, on the ground, among others, that there was no return day in the writ, which was made returnable immediately instead of within ten days as required by the statute.

Harrington, Q. C., contra, argued that the want of a return day was no ground for setting aside the writ.

The COURT, on the following day, said that Mr. Meagher was entitled to his rule on the ground taken as to the want of a return day.

CUMMINGS v. GLADWIN.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 15th, 1883.)

Opening judgment by default.—Delay not accounted for.

RULE to open judgment by default refused where the defendant was fully aware of all the proceedings and failed to account for his delay in moving.

Plaintiff issued a writ of replevin to recover certain goods in the possession of the Railway department, defendant, to whom the writ was directed, being the officer in charge. Judgment was allowed to go by default and no step was taken by defendant until after the issue of a writ of inquiry and an inquisition held, when application was made to JAMES, J., at Chambers, to re-open the default, and for leave to come in and plead. The learned Judge was of the opinion that the defendant had a good defence, but dismissed the rule on the ground that defendant had been aware of the proceedings from the outset, and had not sufficiently accounted for the delay. From this decision defendant appealed.

Borden and Pearson in support of appeal.—The tendency of the Court is to allow parties to come in, unless it is shown that some irreparable injury will be done the plaintiff; *Atwood v. Chichester*, 3 Q. B. Div., 722. (WEATHERBE, J.—Lapse of time is not a bar, but the question is whether you account satisfactorily for the delay. The reason given here is that the defendant did not know of the necessity for pleading, but he had been informed of the existence of the judgment. All he had to do was to read the writ to show him that he had to do something. The whole thing seems to have been treated with contempt. SMITH, J.—Any person of ordinary intelligence could have understood the notice that in default of appearance and plea, judgment would be entered.) It appears that the defendant left the matter entirely in the hands of his superior officer. (JAMES, J.—Then the Government must protect him. WEATHERBE, J.—This man is really not the defendant. The defendant is the Government.) There is nothing on the face of the proceedings to show that anyone but the defendant is responsible. (WEATHERBE, J.—

If the defendant had not been a Government officer he would not have lain by as he did. I should suppose that the delay was intentional. JAMES, J.—It is perfectly clear that it was. SMITH, J.—If it was so the defendant should not be allowed to come in. WEATHERBE, J.—The defendant is not asking to have the default removed.) It appears from Mr. Taylor's affidavit that he was the defendant's superior officer, that the defendant handed all the papers to him and acted under his instructions as agent of the Railway.

Appeal dismissed.

CORBETT ET AL. v. STRONACH ET AL.

Before McDONALD, C. J., and SMITH, JAMES, and WEATHERBE, J J.

(Decided February 16th, 1883.)

Suspension of remedy by taking acceptance.

To an action for goods sold defendant pleaded that plaintiffs had taken in payment a draft drawn by the master on the consignees for freight, which draft plaintiffs had agreed to insure. The plaintiffs charged the premium to defendants but did not insure and the freight was lost. The County Court Judge found, on the evidence, that although defendants had intended plaintiffs to insure the draft, plaintiffs had never undertaken to do so and had not taken the draft in full satisfaction of the debt.

Appeal dismissed.

JAMES, J., dissenting, held that in charging the defendants with the premium plaintiff had led them to assume that the freight was insured.

Appeal from County Court, District No. 3. This was an action on the common counts for goods supplied to defendants' vessel. The defence was that the plaintiffs took a draft drawn by the master on the consignees for the freight in payment of their bill, and gave a receipt for the same, and agreed to insure the amount of the draft, and charged defendants with the premium. Plaintiffs did not insure, and, in consequence of the loss of the vessel, no freight was earned.

The evidence was contradictory, but the learned County Court Judge found that the master requested the plaintiffs to insure to the extent of their bill for their security, and that they replied that they would do so, that it was what they had done in the case of another vessel, and that the master, as the result of this, expected the plaintiffs, as agents for, and on

behalf of the owners, to apply for and take out a policy on the freight for the benefit of the owners and the additional security of the plaintiffs. But he was equally convinced that the plaintiffs did not so understand it. They expected the master or some one of the owners, to make a formal application for a policy, which, if granted, was to be made payable to the plaintiffs as, he inferred from the evidence, was done in the case of the *G. F. Day*, and never regarded themselves as the defendant's agents for that purpose. He concluded, "looking at all the circumstances, I cannot find that the plaintiffs intended to take this draft, even with the alleged authority to insure, in full satisfaction of this debt, nor do I think it was so understood by either party. I think that if the vessel had earned her freight, and the captain had stopped the acceptance of the draft, the plaintiffs would still have had their remedy for the debt against the defendants, to whom I believe that credit was given. I think moreover, that if the plaintiffs had done as the defendants expected, effected an insurance to the amount of the draft in some apparently safe office for the defendants, and if, after the loss of the vessel, the office had failed and paid nothing, the debt would still have remained a subsisting debt against the defendants, which they could recover in this action. In other words, I find that the remedy was suspended merely, and not discharged, by the draft. If there was any contract to insure it was collateral with and independent of the contract for the sale of the goods, and formed no part or condition of it."

Judgment was given for plaintiffs, from which defendants appealed.

Graham, Q. C., in support of appeal.—If the Corbets had insured, as they agreed to do, it is absolutely certain that they would have been paid, the bill having been drawn on the freight. Plaintiffs charged defendants with the premium, but neglected to insure. The Judge finds that Brown, the master of the vessel, expected plaintiffs to insure for their own benefit and the benefit of the owners, but that the plaintiffs did not so understand it. Corbett admits that the premium was charged, but pleads as excuse for not insuring that the master did not sign an application nor authorize them to do so. There

was a completed contract to insure. (WEATHERBE, J.—It all depends on that. SMITH, J.—The Corbetts swore they did not know the clerk put the charge in the account.) The clerk was not called, but that cannot affect it. The book-keeper and George Corbett did the business. (WEATHERBE, J.—Was there any positive agreement that plaintiffs were not to be paid, except by insurance?) That is the only inference to be drawn from the evidence. (SMITH, J.—You want to overcome the positive oaths of the Corbetts by an inference.) The Corbetts are contradicted, and the Judge disbelieved them. (WEATHERBE, J.—Suppose he did, have you a contract?) I think so. (SMITH, J.—What consideration was there for the agreement to insure?) The premium charged in the books. The Corbetts agreed to take a risk. The case in *11 Exch.*, 684, was very like this. It shows that plaintiffs could have insured. (McDONALD, C. J.—It is not this case.) It shows that Corbett had an insurable interest, and, if he had insured, could have recovered for the amount. (WEATHERBE, J.—The point you have to meet is whether the contract was that the plaintiffs should look entirely to the policy of insurance for the goods supplied the vessel, and that, in case of there not being a loss, they should get nothing. If that was not the contract you are out of court.) The Corbetts deny the contract of insurance altogether, and the Judge has disbelieved that. (WEATHERBE, J.—Show from the evidence of Brown or Stronach that they made the contract I have stated.) As the draft was lost through the laches of the plaintiffs, it must be treated as payment; *5 Beav.*, 423; *7 Am. Reps.*, 397. The contract may be implied from the conduct of the creditor. The Corbetts were guilty of laches in not insuring. (MacCoy. —That is not in the rule.) *2 Wilson*, 353; *5 Esp.*, 122. They got the premium to insure, and if they choose to become their own insurers they should suffer the risk. (McDONALD, C. J.—That would be a good argument if there was any evidence whatever of such an intention.) There can't be any doubt that the Corbetts undertook to insure for our benefit. If by their neglect we have lost the benefit of that security, they cannot recover in this action; *2 American Leading Cases*, 287. (JAMES, J.—Would you not, in putting it in that way,

be seeking to offset a claim for damages ?) Not at all. The cases cited make this a good defence.

MCDONALD, C. J.—The two points relied on in this case are, first, that the plaintiffs agreed to accept the draft on consignees in full payment; secondly, that plaintiffs, having agreed to insure the draft as their own, and neglected to do so, are liable for the amount, and it must be inferred that they agreed to accept the insured draft in payment. As to the first point, the plaintiffs deny it absolutely, while neither Brown nor Stronach pretends an agreement to accept the draft as payment; nor do they, except inferentially, assert any agreement to insure. They no doubt desired plaintiffs to insure the draft, and supposed they would do so, but the evidence of assent to such contract on the part of the plaintiffs is vague. Even admitting an agreement on the part of plaintiffs to insure, how can such an agreement be construed into a stipulation to take the draft as payment, particularly as it might reasonably be supposed that the plaintiffs would be sufficiently careful of their own interest not to neglect insurance on a draft on which they were solely to rely for payment.

WEATHERBE, J.—Although I do not like the conduct of the plaintiffs in this transaction, yet, whether from design or not, no contract was completed between the parties upon which the defendant could set up this defence.

JAMES, J.—I would quite agree with the view just expressed if it were not for the charge made by the plaintiffs for insurance. Defendants were led to alter their position. They did not insure because plaintiffs told them that they had insured.

THE QUEEN v. THE WARDEN AND TOWN COUNCIL OF DARTMOUTH.

Before McDONALD, SMITH, JAMES, and WEATHERS, J. J.

(Decided March 12th, 1883.)

Mandamus.—Rule to quash too late after return day.—Res adjudicata.

DEFENDANTS obtained an order to quash a writ of mandamus on grounds appearing on the face of the writ, together with other grounds appearing by affidavit. On the return day of the order defendants obtained from the Court *in banco* a rule discharging this order, giving defendants leave to move the Court on the grounds taken in the order *nisi*. Defendants moved the Court accordingly, and obtained a rule to quash the writ, which provided that the defendants should have ten days after the discharge of said rule to make their return to the writ.

Held, that the motion to quash should be made before the return day, and that the provision in the rule *nisi* giving time could not be said to have extended the return.

Held, as to other grounds taken in the rule, viz., that the application should have been made promptly, that no sufficient matter appeared in the writ, that other legal remedies existed, and that the writ required defendants to do an act exceeding their authority, that these grounds could have been taken in showing cause to the rule *nisi* for the mandamus, and therefore could not form the ground of a motion to quash.

The further ground was taken that no valid order existed for the issue of the writ as the order was for a peremptory mandamus, and the writ was in the alternative.

Held, that as the Court understood, in granting the rule, that they were making a rule for a mandamus alternative, the matter was *res adjudicata*.

A writ of mandamus having issued on September 1st, 1882, at the instance of the Sessions for the County of Halifax, to compel the Warden and Town Council of Dartmouth to assess on the property within the town, liable to assessment, the sum of \$15,976 for its proportion of County School rates for the years 1873-1878, under Section 52 of the Educational Act, *Revised Statutes*, Chapter 32, a rule *nisi* was obtained, on behalf of the Warden and Council, returnable before the Supreme Court *in banco*, with a stay of proceedings in the meantime, to quash and set aside the writ of mandamus and service thereof on the following grounds:—

1. That the said writ of mandamus was not issued in term, but the same was issued during the vacation of the said Supreme Court.
2. That the said writ of mandamus was not and is not made returnable on a day certain in the term next after the same was issued, nor is the same made returnable in term.
3. That no time was allowed by the Court within which the said writ of mandamus should be returnable, nor is the

same made returnable within any time allowed by the Court, but the time within which the same was made returnable was fixed by the Prothonotary of the said Court.

4. That the said writ does not purport to be granted by the Court, nor does it bear the words "by the Court," nor any words purporting that the same was granted by the Court, but the same appears to have been issued by the Prothonotary as an ordinary writ and is not tested.

5. That the said writ was not served upon Byron A. Weston, Esquire, one of the members of the said Town Council, until the fourteenth day of September, instant, yet the said Byron A. Weston is required to make his return to the said writ on the twentieth day of September, and sufficient and legal time has not been allowed to him to make said return.

6. That the said writ does not allege in terms the want of any adequate legal remedy for the matters complained of therein, and no such want is shown on the face of the said writ.

7. That an adequate legal remedy exists for the matters complained of in the said writ by arbitration or by suit or action.

8. That the said writ of mandamus requires and commands the Warden and Council of the said Town to do an act exceeding the authority given to them by the statutes in that behalf, and which it would be illegal for them to do.

9. That no valid rule or order has been made by the Court for the issuing of the said writ of mandamus.

10. That the application for the said writ of mandamus was not made promptly after the alleged failure or refusal of the Warden and Council of the said Town to perform the duties set out in the said writ, and alleged therein to have been incumbent upon them, but the said application was greatly delayed.

11. That the application for a mandamus herein was made in the first instance on behalf of the Sessions for the County of Halifax, and the Municipality of the County of Halifax has improperly intervened in the said matter without any rule or leave obtained therefor, or suggestion made.

12. That the said Municipality did not succeed to the rights acquired by the Sessions in the matters complained of in the said writ.

13. That the Council of the said Town is not composed of the same persons who were members of the said Council at the date of the rule *nisi* for a mandamus herein, or at the date of the rule absolute upon which the mandamus herein issued, but several of the persons upon whom the said writ has been served have had no notice of any proceedings herein previous to the issue of the said writ, nor has any leave been obtained for the service of the said writ upon the said persons.

14. That no assessment can legally be made by the said Warden and Council as required by the said writ of mandamus.

15. That the said writ of mandamus is not properly directed, being addressed to the Warden and Council of the Town of Dartmouth, and not to the members of the said Council personally.

On the first day of term, on motion of Counsel for the Warden and Town, the above rule was discharged, on payment of costs, if any, with leave to the defendants to move the full Court for a rule to set aside the writ of mandamus and the service thereof, on the grounds set out in the order discharged. A fresh order was taken accordingly and was argued March 7th, 1883.

Ritchie, Q. C., takes preliminary objections.—The defendants took a rule to quash the mandamus on the 20th September, returnable before the full Court. On the first day of term that rule was abandoned and the present rule was taken on the same affidavits and in the same terms. A mandamus cannot be quashed for matter appearing on the face, but it must be superseded. The motion to supersede must be made before the return day. The return day, here, expired on the 20th September. *Tapping on Mandamus*, 336, 338; 2 *Barnardiston*, 326, 447; *Bacon's Abridgt., Tit. Mandamus b.*; 1 *Wilson*, 30; *Tapping on Mandamus*, 338. The writ cannot be quashed on grounds that could be shown against the rule *nisi* for the mandamus; 6 *Q. B.*, 441. The latter

case goes the whole length. The 1st, 2nd, 3rd, 4th, 6th, 9th, 11th and 15th grounds are only grounds for superseding the writ, and should be taken before the return day. The 7th, 8th, 10th, 12th, 13th and 14th are grounds which could have been shown against the rule *nisi*, and in fact were taken; *1 R. & G.*, 410; *3 R. & C.*, 155. Defendants cannot abandon their first rule and take another. There is no sufficient rule giving the defendants leave to move again.

Russell, in support of rule.—The writ must allege in terms the want of an adequate legal remedy. *High on Extraordinary Remedies*, sec. 540; *Tapping on Mandamus*, 323. If it does not do so it may be quashed. It must not merely show that there is no adequate legal remedy which may be gathered or inferred from it, but it must go further and distinctly state it. The motion to quash is in the nature of a special or a general demurrer. Where it is in the nature of a special demurrer it must be made before the return, but where it is in the nature of a general demurrer for defect in substance, it may be made at any time; *Wood on Mandamus*, 41, 42. Objections of both kinds appear in the sixth ground for quashing the writ. As to allegation required in writ see *5 Mod.*, 420. Either or both grounds must be taken before the return; but, in regard to grounds of general demurrer, the time is enlarged, and they may be taken after the return as well as before. The writ must state the want of any other remedy, and where it does not do so the defect is one of substance; *King v. Margate Pier Co.*, 3 B. & Ald., 223. Putting the writ together with what the Court know of the law, it does not show the want of an adequate legal remedy; on the contrary, such a remedy exists. The general law in regard to County Assessments for school purposes is contained in section 52 of chapter 32, *R. S.* The *Act of Incorporation* of the Town, Acts of 1873 and Acts of 1877, chapter 40, imposed the duty of collecting this amount upon the Warden and Council of the town. We contend that, by a subsequent section, all school moneys belong to the town, though that question does not arise here. It clearly appears that there was a dispute between the county and the town, and, that appearing, the statute has given a mode of settlement

by arbitration; *County Incorporation Act of 1879*, chap. 1, sec. 90. (WEATHERBE, J.—It appears that a duty was imposed on the town which they declined to perform, though the reason does not appear.) The section cited was intended to cover just such a dispute as this, as to the proportion of assessment to be borne by towns within the limits of a municipality. (Ritchie, Q. C.—The dispute arose before the statute.) It is a continuing dispute, and the statute applies. The statute passed the 14th April, 1879, and the rule was taken in February, 1879. Independent of the remedy by arbitration, there was a remedy by suit. The Act of 1877, chapter 40, section 2, made the town competent to sue and liable to be sued. The writ of mandamus will not be issued in a doubtful case, such as this. If the Court can avoid the issue of the writ by giving any other remedy it will do so; *High on Mandamus*, chap. 9, sec. 32. No ground can be raised after the issue of the rule *nisi* for the mandamus, which is palpable and obvious, and could have been made plain to the Court when the rule *nisi* was moved; but, if the objections are serious and *bona fide*, it would be trifling with the Court to raise them on the rule *nisi*, but they should be reserved for solemn adjudication when the matter comes up subsequently. The legality of the writ of mandamus, and the possibility of the town carrying it out, were left open to us by the decisions of both the Supreme Court of this Province and the Supreme Court of the Dominion. Only one case has been cited to show that we cannot take grounds now that we might have taken in answer to the rule, and the circumstances there differed from those here. In the decisions in *1 R. & G.*, 416, the Court held that they had no power to issue the mandamus. It was considered that if the town was liable there was no mode of enforcing it. The Supreme Court of Nova Scotia and the Supreme Court of Canada have decided that these points could not properly be raised on the rule *nisi*, and the case does not therefore come within Lord DENMAN'S dictum; *Buller's N. P.*, 200. Assuming that the point is open, the writ is void, because it commands the town to do an illegal act; *Acts of 1873*, chap. 17, sec. 42; *Acts of 1877*, chap. 40, sec. 30. The town is prohibited from levying for ordinary and extraordinary expenditure, any sum exceeding \$15,000,

unless authorized by special legislative enactment. This was recognized by this Court in *1 R. & G.*, 416. The decision, however, assumes that the legislature overlooked the liability of the town to the county. It should be assumed on the contrary that the legislature legislated with all the facts before them. (WEATHERBE, J.—If the writ is set aside what is to become of the rule?) It is *functus officio*, it has served its purpose. (WEATHERBE, J.—But a new writ may issue.) Not without a fresh order. (WEATHERBE, J.—Yes, writ after writ may issue. The order stands, but the writs, though in compliance with the rule, and regular on their face, are quashed as fast as they are issued.) (*Graham, Q. C.*—A writ will be quashed where it is directed to a person who cannot lawfully execute it,—*Archbold's Crown Prac.*, 213,—or where the writ is directed to a person commanding him to do an act in excess of power vested in him by act of Parliament. *Ibid*, 288.) In *Rex v. Starling*, 2 Keble, 91, an alias writ was refused and a special order was given for a new writ.

Ritchie, Q. C., contra.—Formal objections should be taken before the return day. The return day was never extended. *Tapping on Mandamus*, 344. The stay of proceedings and time to plead were abandoned with the rule. They were merely ancillary to it. The time was gone when the rule was abandoned and could not be extended. The writ could always be issued in vacation though tested in term. The teste is not the same as the issue. The writ is issued in term; that is, the Court is always open. *Acts 1880*, chap. 13. The teste of all writs of mesne process or otherwise is abolished and all writs are dated in term. *Practice Act*, sec. 27; *Rev. Statutes*, chap. 95, sec. 52. The Court need not be sitting when the return is made. *Tapping*, 328; *7 A. & E.*, 283. If the teste is wrong the Court will amend it even after return. *Tapping*, 329. No authority was cited for the ground that the writ does not purport to be granted by the Court. *Tapping*, 330. It is set out in the mandamus itself that it is by rule of Court, and the date is given. This is going further than the English form which requires, before the name of the officer, the words, “by the

Court." It is not denied that he is the proper officer. As to form of writ, cites *Archbold's Crown Practice*, 211. There is no allegation there that there is no other remedy. (WEATHERBE J.—It is enough that it appears on the face of the writ, so that any lawyer can see it, that there is no other remedy.) The writ may be directed to the whole corporation or a part. *Tapping*, 315; 9 A. & E., 676; 3 A. & E., 544; 2 M. & G., 591. Special demurrers are abolished.

All the grounds of objection taken are open to amendment and can be amended by this Court. All the questions can come up on the return. *Tapping*, 338; 7 D. & Ry., 708; *Tapping*, 362, 301, 303; *Arch. Cr. Pr.*, 285.

Graham, Q. C.—The mandamus was returnable September 20th, 1882. On that day, before the return day was out, we obtained the order *nisi* to quash the mandamus, and an order absolute giving ten days from the date of the argument for making a return. The return day was extended and we have moved within that time to quash the writ. A teste is necessary to the writ. The provisions of the Common Law Procedure Act were held not to apply to the writ of mandamus, and a special statute was passed making it applicable. Our practice makes no provision for a return day, but the writ may be made returnable forthwith. The proceedings having been commenced in the name of the Court of Sessions; there was no provision for introducing the municipality. (McDONALD, J.—Could they not intervene?) Not without a statute. We have a right to demur, and if the demurrer is overruled the objection may be taken on the trial. It may be taken over and over again. In regard to amendment, in England, they rely on an old statute to amend mandamus, and proceedings thereon. 4 Anne, cap. 16; *Archbold's Cr. Prac.*, 276. The writ must be returnable in the next term. If terms are abolished it is not our fault. 3 Q. B., 981.

WEATHERBE J., now, (March 12th, 1883.) delivered the judgment of the Court as follows:—

This cause has been already more than once before this Court, resulting in a rule absolute for mandamus. Upon appeal to the Supreme Court of Canada the judgment of this

Court was affirmed, after which the writ was issued on the 1st day of September last, returnable on the 20th day of that month. Notice was given by defendants on the 19th September of a motion before a Judge to set aside the writ with a stay of proceedings. On the 20th September a rule *nisi* was granted, returnable before the Supreme Court in banc on the first day of December term, with a stay of proceedings in the meantime, by Mr. Justice James to set aside the writ on fifteen grounds. On the 12th day of December, on motion of defendant's counsel, an order was made discharging the said rule *nisi*, with leave to move again to set aside the writ. The rule *nisi* before us is dated on the same day, containing the same grounds and upon the same affidavits as that granted by my learned brother James. Mr. Ritchie, for plaintiff, took objection to this rule *nisi* on the ground that the defendants should not be permitted to move twice. This led to enquiry as to the cause of discharging the rule granted by Mr. Justice James, for which no reasons have been suggested, and we have ascertained that upon the day that rule was discharged and the rule *nisi* before us was taken there were only two Judges on the Bench having jurisdiction of this matter, the others having been concerned in the cause at the Bar, and upon that ground, under our statute defining a quorum, we would probably be obliged to discharge this rule *nisi* if a motion had been made for the purpose. We offer no opinion as to whether it is competent or obligatory upon us to do so without such motion, since there are other reasons why the rule *nisi* cannot be sustained. Some of the grounds relied on by the defendants are for defects on the face of the writ: that it was issued in vacation; that the time for return is bad; for want of teste; and on account of the absence of the words "By the Court," and absence of words alleging a want of legal remedy; that the writ is not properly directed.

It is urged in answer to these points that our Court, by statute, is always open, that the time for return is made according to the practice of the Court, that by statute the teste of all writs is abolished, that the rule absolute under which the writ is authorized is fully recited on the face of the writ, that no words in terms alleging want of legal remedy

are required as shown by the English forms and practice, and that it is sufficient if such want is apparent on the face of the writ, that the writ is framed according to the rule absolute and, besides, it is directed according to the practice on the subject, as the authorities cited show.

We should have little or no difficulty in deciding nearly all these questions in favor of plaintiff. If any difficulty arises it is probably as to one or two only of these objections and if the power of amendment exists in this Court which is disputed, it would be exercised.

On the part of the plaintiff it is urged, however, that a motion to supersede or quash must be made before the return day of the writ is out. This we do not understand is disputed and if so we have no doubt the authorities are conclusive. But Mr. Graham and Mr. Russell who have very ably urged everything that could be said for defendants contend that the Court has extended the time for the return. These are the words relied on :

“Unless cause to the contrary be shown before this Honorable Court *in banco* at Halifax, on the sixteenth day of December, instant, and that in the meantime all proceedings herein be stayed, and that in the event of this rule being discharged the said Warden and Council have ten days after the discharge of this rule to make their return to the said writ of mandamus.”

If the rule had stopped at the end of the words “and that in the meantime all proceedings herein be stayed,” it could not be said that it was ever contemplated to extend the time for making the return, and the words to be relied on for extension of the return simply give time in a certain event which might never take place, that is in the event of the rule *nisi* being discharged. This conditional extension of leave to return may perhaps have been made on the assumption or under the mistake that the time had already been extended or was not yet expired.

We think that to extend the time for return either express words should have been used or the implication should have been plain. This rule *nisi*, if valid, cannot be said to have extended the return, and the short argument of Mr. Ritchie that the grounds mentioned are taken too late, must prevail.

The writ was served on the Warden, Clerk and all the members of the Council, but it was argued that the service on one of them—Mr. Weston—was insufficient. We think this objection cannot prevail.

There remain other grounds, some of which are perhaps of more substantial importance to defendants; that no valid order exists for issuing the writ of mandamus; that the application for the rule *nisi* for the mandamus should have been promptly made after the refusal of defendants to assess; that no sufficient matter appears in the writ; that other adequate legal remedies exist; that the writ requires defendants to do an act exceeding their authority or authority given by law.

The argument made before us that any grounds which could have been used in shewing cause to the rule *nisi* for the mandamus cannot be urged on a motion to quash the writ is, we think, supported by the authorities discussed at length before us.

These grounds might all have been taken,—the most important of them were urged,—on argument of the rule *nisi*, and we must understand that they were considered insufficient. No doubt a writ of mandamus may be superseded or quashed for defects on the face of the writ, but we are now dealing with what is the very groundwork of the proceeding. Here is the rule absolute:

“ On hearing the rule *nisi* granted herein on the 1st February, 1879, and the affidavit therein mentioned, and on argument of counsel on behalf of the Municipality of the County of Halifax in support thereof, and on hearing read the affidavits in reply, submitted by the Warden and Council of the Town of Dartmouth, and on argument of counsel on their behalf, it is ordered that said rule *nisi* be made absolute with costs, to be paid by the Warden and Council of the town of Dartmouth; and it is further ordered that a writ of mandamus do issue out of this Court, directed to the Warden and Council of the town of Dartmouth, directing and commanding them forthwith to assess upon the property within the town of Dartmouth, liable to assessment, the sum of fifteen thousand nine hundred and seventy-six dollars, and

collect the same and pay it over to the the Treasurer of the Municipality of the County of Halifax.

Dated at Halifax this fifth day of April, 1881.

By the Court.

(Sgd.) M. I. WILKINS.

It was said by Mr. Russell that this order absolute authorizes the issue of a peremptory mandamus and that the writ itself is an alternative mandamus and that on that ground it must be quashed. We are not called upon to offer an opinion as to the cogency of this argument. This Court,—I was not present and took no part,—seems to have understood that in granting this rule absolute they were making an order for the issue of a mandamus alternative, and the Supreme Court at Ottawa, with the order appealed from before them, treated it as of the same character and understood that the writ to issue was one requiring a return.

The writ therefore is issued according to the terms of the order absolute and upon a recital of all that took place previously and the statutes discussed in this Court and upon the appeal. The matter therefore is *res adjudicata*.

Can it be said that the Court would overrule objections on shewing cause and allow the writ to issue for the purpose of setting it aside on these same objections to be raised afterwards? We think not.

It was said by this Court in allowing the rule absolute, and by some members of the Supreme Court of Canada on refusing the appeal, respecting objections there urged without avail, that certain questions might come up on the return. We have to offer no opinion whatever as to what may be urged on the return. We put our decision expressly on the ground already mentioned and not upon the ground that the objections raised before us are prematurely taken and may be raised on the return. If any further questions should arise they must be decided under the law and not upon anything that we have deferred or postponed. We say nothing one way or another as to what is proper to be raised on a return. The rule *nisi* will be discharged with costs.

JAMES, J., dissented.

HOLDSWORTH, PETITIONER, v. RUSSELL, RESPONDENT.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, JJ.

(Decided March 3rd, 1883.)

Contested Municipal Election.—Candidate not disqualified by being Secretary of School Trustees under sec. 7, cap. 1, Acts of 1881.

A PETITION was presented to the County Court Judge against the election of respondent as a County Councillor, on the ground that he was disqualified from being a candidate by virtue of his office as Secretary to School Trustees, and, as such, a collector of school rates in his section.

Held, reversing the decision of the County Court Judge, that such an office was not within the disqualifications in sec. 7, cap. 1, Acts of 1881.

This was an appeal from a decision of SAVARY, County Court Judge for District No. 3, adjudging void the nomination and election of the respondent as a Municipal Councillor for Ward No. 3, in the Municipality of Digby, and declaring that the petitioner, who was a candidate for election, had been legally elected, and ought to be returned. The main grounds upon which the respondent's election was attacked in the petition, and upon which the decision appealed from proceeded, were:—

First. That the nomination, election and return of the said John A. Russell as a Councillor are void, he being at the time of said nomination and election a collector of rates in a certain portion of the Municipality of Digby, contrary to the statute in such cases made and provided.

Secondly. That the nomination and election of the said John A. Russell as Councillor is void, he being at the time of such nomination and election Secretary of the Trustees for School Section No. 28 in the District of Digby, and, as such secretary and collector of school rates, his nomination and election are void under the statute.

The statute of which the respondent's election was claimed to be a violation was the *County Incorporation Amending Act of 1881*, Acts of 1881, chapter 1, section 7.

The appeal was argued February 24th, 1883, by Graham, Q. C., and Borden, in support of the appeal, and Harrington, Q. C., *contra*.

THOMPSON, J., (March 3rd, 1883,) delivered the judgment of the Court:—

At the Municipal elections in November last, the appellant

(Russell) was one of the Councillors who had a majority of votes in Polling District No. 3, in the Municipality of Digby, and was returned, as elected, by the presiding officer. The petitioner (Holdsworth) applied to the County Court Judge, under the *County Incorporation Amendment Act of 1881*, to have the return vacated, on the ground of disqualification in Russell, and to have himself seated as being the candidate next on the poll. The County Court Judge sustained the petition, unseated Russell, and awarded the seat to Holdsworth, and an appeal from this decision was argued before us on Saturday last.

The disqualification alleged was that the respondent was, at the time of the election, a Secretary to the Trustees of School Section No. 28, in the County of Digby, and that by virtue of that office he was charged with the collection of school rates levied on the inhabitants of that school section for the support of the school therein.

At the argument before this Court it was conceded that the appellant held the office referred to, and was charged with the duty just mentioned, so that the case turns on the construction of section 7 of chapter 1 of the *Nova Scotia Acts of 1881*, which is as follows :—

“ No person shall be elected a Councillor who holds the office of County Clerk, County Treasurer, or collector of rates of any kind, and if any such person be nominated for the office of Councillor his nomination shall be void, unless before the expiration of the time for making such nomination he resigns such office so held by him. Any Councillor who shall accept any such office under any Municipal Council shall thereby vacate his seat as such Councillor, and his place shall be supplied in the same manner as if he had resigned his seat. If any person who holds any other office under any Municipal Council shall be elected a Councillor, he shall upon taking his oath of office and seat as Councillor *ipso facto* vacate such office, and his place may be thereupon supplied by another person being appointed to such office. No person vacating office by virtue of his taking his oath of office and seat as a Councillor shall be liable to any penalty as for refusing or neglecting to serve in such office for the remainder of the time for which he was appointed to such office. This

section shall be read and construed as if the same had been enacted on the tenth day of April, A. D. 1880, instead of section 9 of the Act hereby amended, and the provisions of said section 9 of the chapter hereby amended shall cease to have any force or operation whatsoever, provided no case now pending in any court shall be affected by this Act."

The history of this section can be traced through the previous Acts. In the original *County Incorporation Act*, (chapter 1 of 1879,) contractors with the county were excluded from the Councils, but no provision was made in relation to county officers, many of whom were subject to a like objection on grounds of public policy, as being appointees of the body of which they were members, and, in many cases, as being accountable for public moneys to that body. The danger,—rendered all the greater by the smallness of the new governing bodies,—was too apparent to go long without a remedy, and in 1880 a sweeping provision was enacted, prohibiting the election of any person holding any office under the Council,—making his nomination for Councillor void, and providing that if a Councillor should (after election) accept any office under the Council, he should forfeit his seat. This seems to have been found too sweeping, for in 1881 it was repealed, and the section above quoted was enacted in its place, limiting the disqualification to a few offices. The first three lines are relied on for the disqualification:—

"No person shall be elected a Councillor who holds the office of County Clerk, County Treasurer, or collector of rates of any kind."

The appellant claims that this language only refers to clerks, treasurers and collectors appointed by the Councils, and that the words "collector of rates of any kind" must be limited to collectors appointed by the Council to collect any kind of rates imposed by order of the Council. There would be much reason for the legislature to draw a distinction between collectors of that description and such officers as secretaries of school trustees. In the one case the officer is the appointee of the Council,—he receives the Council's money, his accounts may come before that body for supervision and revision, and, in the event of default, the Council is to be the prosecutor. In the other case the officer is appointed by

another and totally distinct corporate body, the funds which he receives are the property of the trustees of schools of his section, he is to account to the trustees, and he is in no respect whatever under the jurisdiction of the Council. As a Councillor, therefore, the secretary can have no voice in his appointment to the office, nor can his vote shelter him in the least degree from accountability. The learned Judge of the County Court, in dealing with this question of policy, suggests that the legislature may have intended to prevent the possibility of a secretary of school trustees using the rate-roll of his section to aid him in his canvass, but it can hardly be supposed that the subject of corrupt practices would be dealt with in that way. Bribery and intimidation at elections are not usually sought to be prevented by making ineligible for candidature the persons who have the means of using these unworthy influences. If that were the policy the legislature should, to be logical, disqualify every man who has a ledger or is likely to have a purse, and this Act, to be at all effective, should have disqualified a number of county officers,—assessors, for example, who can still hold their offices during their candidature. Corrupt practices are dealt with in another part of the Act, (of 1881,) and in another way. The learned Judge came nearer, we think, to the object of the disqualifying clause when he referred to the powers of the Council to make by-laws concerning “tolls, rates and municipal revenues,” and also to the anomaly of the secretary of the trustees sitting as Councillor on an appeal from the sectional assessment, in which, in respect of his commission, he would have an interest. As regards the first of these points, however, the learned Judge is mistaken as to the matter of fact,—the Council has no power to make any by-law touching the sectional assessment for the support of schools. As regards the second, it is very doubtful if the commission of the secretary would be affected by the result of an appeal, as the commission depends on the amounts paid to him, and rates appealed from are, it would seem, to be paid before the appeal is asserted; but even if this were not so, it would be difficult to suppose that the legislature intended to meet so rare and trifling an anomaly by making ineligible for Councillorship some hundreds of useful officers, who perform troublesome services for the

public, and who receive no remuneration, excepting a trifling commission on the moneys which it is a part of their duty to collect. It would be still more strange to find such a policy embodied in an enactment which was mitigating, very decidedly, the sweeping disqualification clause of 1880, by which clause *all* officers appointed by the Council were made ineligible. It is worthy of remark, also, that such a construction would disqualify collectors of rates in incorporated towns and cities from serving in the County Council, although no reason of public policy could be urged against their doing so. Speculations as to the policy of the legislature are, however, often uncertain guides to the true construction of statutes, and in this instance we feel that it is not necessary wholly to rely upon them. We have discussed them as not being unfavorable to the appellant, in relation to the first lines of the section above quoted, viz: "No person shall be elected a Councillor who holds the office of County Clerk, County Treasurer, or collector of rates of any kind, and if any such person be nominated for the office of Councillor his nomination shall be void;" but the voice of the legislature does not leave us here. The class at whom disqualification was aimed were prevented from being elected to the Councils, but the legislature had still to say what consequences would follow if a Councillor, after his election should, by accepting one of the designated offices, become one of that class, and this time, in referring to the class, it uses words which, in our judgment, leave no doubt as to who are within and who are not within the class legislated against in the whole section. These are the words:—"Any Councillor who shall accept any such office under any Municipal Council shall thereby vacate his seat as such Councillor."

The words "any such office" are to be read, we hold, as if they were followed by the words "as before mentioned." There was evidently no intention by this expression to deal with a new class of persons, or to enlarge the class, or to reduce it, as was contended when we were asked to read these words as equivalent to the words, "any office of a like character." The legislature would hardly vary, add to or diminish the class by language so inapt and vague when dealing with so important a matter as the creating of disquali-

fications. The judgment appealed from suggests the meaning of the whole section to be this: that while, by the first part of it, all officers who are charged, even incidentally, with the collection of any rates, (such as this officer,) are excluded from nomination to the Council, a Councillor, after his election, may be appointed to any such office as the appellant holds without losing his seat in the Council, unless the appointment to the office has come from the Council itself; in other words, that a secretary of school trustees, before becoming a candidate for the position of Councillor, must resign his office, but immediately after his election he can take it up again and continue to exercise it,—that the legislature intended “to secure the freedom of the polls from the influence of a candidate armed with a rate-roll,” and to “protect the public from the abuses which might result from the politic remissness of a collector canvassing among delinquent rate-payers,” yet had so little insight into this evil as to allow a Municipal Councillor, after he had once secured his seat, and before he or his friends should have to offer for re-election, to arm himself with such a rate-roll, and to prostrate the same freedom by his “politic remissness” as “a collector canvassing among delinquent rate-payers;” finally, that the anomaly of a secretary sitting on appeals, in which his commission might be in jeopardy, was to be considered a dangerous abuse on nomination day, but harmless thereafter. We cannot concur that this is the true construction. We think, as already intimated, that the legislature was, in the words just referred to, proceeding to say, in the same line of policy as that inaugurated in the first part of the section, and in relation to the same disqualified class, and in order to make the same disqualification fully effective, what should be done in case the disqualifying office, instead of being held before the nomination of a Councillor, should be received by him after election. This will confine the operation of the first part of the section to “collectors of rates of any kind” *holding office under any Municipal Council*, and will carry out consistently what we conceive to be the policy of the enactment.

The legislature having thus disposed of the cases of persons who were not by reason of office to be elected to the Council, and who were not for the same reason to continue to sit therein if, after election, they should take such office, then

went on to prescribe the manner in which *other* kinds of offices than clerkships, treasurerships and collectorships should affect a Councillor, and it provided that "if any person who holds *any other office under any Municipal Council* shall be elected a Councillor, he shall, upon taking his oath of office and seat as Councillor, *ipso facto vacate such office*," instead of vacating his seat in the Council, as he would do if he became a clerk, treasurer or collector. Here, then, is another indication that only officers *under the Council* are being dealt with.

In the judgment appealed from it is conceded that the construction which we put on the Act would have carried the mind of the learned Judge below if it had not been for the words, (after "collector,") "of rates of any kind," and it has been argued that if only the collectors "under the Council" are intended to be disqualified, they would be called "county collectors," or "collectors of county rates." Such words, however, would not have been large enough or plain enough to include the class to be dealt with, if the policy of the legislature was to be carried out effectively. In the first place, the word "county" could not be prefixed to the word "collector" with propriety, because there are no "county collectors,"—the county rates are collected by a collector for each "district" in the county or municipality, and if the word "county" had been prefixed to "rates," collectors of poor rates, who are appointed by and responsible to the Council, would be omitted. Nor were these the only kind of rates which the legislature supposed the Councils might levy, and appoint collectors for, as a glance at chapter 1 of 1879, sections 54, 61, 62, and section 84, sub-section 4, will shew.

Counsel for the petitioner finally argued that section 79 of chapter 1 of 1879 gave to the Councils the power to appoint all persons who are named in the *Public Instruction Act* for the carrying out of that Act, and gave to the appointees of the Councils all the powers which such persons had under the former mode of appointment,—consequently that the Councils might now appoint the secretaries to school trustees, and that these would then be officers "under the Council" within the construction which we put on the disqualifying section. According to this contention section 79 is not to be limited in its scope and effect to the general purposes of the whole Act, but is to have an eccentric orbit of its own, and is to reach

not only the secretaries of school trustees, but the Lieutenant-Governor, the Council of Public Instruction, the Superintendent of Education, the inspectors, the commissioners of schools, the teachers and various other persons named for the carrying out of the *Public Instruction Act*, all of whom, according to this view, would now be appointees of the Municipal Councils. We cannot catalogue here all the difficulties into which such a construction would lead us, nor need we try. Until the petitioner can at least get rid of the fact that the appellant was not so appointed, but was appointed by the trustees, and therefore does not hold the office so argued to be a disqualifying office, we cannot treat the contention as a practical one.

The appeal must be allowed with costs, and the petition dismissed with costs, including the costs incurred in the Court below, excepting such costs as were incurred in the unsuccessful attempt to fasten the charges of corrupt practices on the petitioner.

MCDONALD v. NEVILLE.

Before McDONALD, C. J., and McDONALD, SMITH and WEATHERBE, JJ.

(Decided April 9th, 1883.)

Action on promissory note.—Plea of set off arising after action.

To an action on a promissory note, defendant pleaded, by way of set off, a judgment for a greater amount recovered against plaintiff by a third party and assigned to defendant after the commencement of plaintiff's action.

Held, that the plea was bad. Even if pleadable the plea could only be to the further maintenance of the action, and not in bar to the whole action.

Assuming the assignment to have been in good faith, defendant might possibly have got the benefit of it on application to the Court in the exercise of its equitable jurisdiction.

This was an action on a promissory note, tried before WEATHERBE, J., at Halifax, in April, 1882, without a jury. Defendant relied upon a plea of set-off setting up a judgment for a greater amount than plaintiff's claim, recovered against plaintiff by a third party, and by him assigned to defendant after the commencement of plaintiff's action. The learned Judge ruled that the judgment pleaded by defendant could not be set off in this action, and rendered a verdict for the amount of plaintiff's particulars. Defendant was allowed to take a rule to set the verdict aside, and for a new trial.

Borden, in support of rule.—The set-off is good. Matter of set-off arising after declaration, and before plea might be

pleaded even before the statute. *4 Doug.*, 181; *1 Doug.*, 112; *3 Wils.*, 396. The old law was changed by *Revised Statutes*, chap. 94, sec. 156. There is no reason why a set-off arising after action should not be pleaded as well as payment, release or any other defence. The plea shews on the face of it that the set-off arose after the commencement of the suit. (WEATHERBE, J.—I should incline to think that the statute only declares the old law or ameliorates the rules of pleading.) I think the statute is wide enough to admit the plea if it could not be pleaded previous to the statute. A set-off comes within the words and spirit of the section. The judgment assigned was a chose in action under the *Practice Act*, section 502. (*Per Cur.*—Was it not necessary in that case, which we doubt, to give notice?) The requirement of notice applies only where a suit is brought. Cites generally *4 Exch.*, 729; *13 M. & W.*, 94. The plea should have been demurred to.

Sedgwick, Q. C., contra, was not called on.

MCDONALD, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

I do not think that this plea is good, setting off as a defence at law a judgment obtained by a third party, against the plaintiff, in another Court, and assigned to the defendant only after the commencement of this suit. No authority has been cited to support such a plea, and, at most, even if pleadable at common law, which I think it is not, it could be only pleaded in bar to the further maintenance of the action; not like this plea, in bar to the whole action. Assuming the assignment to have been in good faith, it is possible, although not here necessary to decide the point, that the defendant could get the benefit of it on application to the Court, in the exercise of its equitable jurisdiction, as pointed out in *Chitty's Archbold's Practice*, 12th edition, 723. This may be done in some cases which are not, however, quite the same as this. In a foot-note, at that page, we find *Simpson v. Lamb*, 26 L. J., Q. B., N. S., 460., cited to shew that "the right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the Court, with reference to all the circumstances of the case." I think this cause was properly tried, and that the rule *nisi* ought to be discharged with costs.

KNAUT v. SPONAGLE ET AL.

Before McDONALD, C. J., and McDONALD, JAMES, and RIEBY, JJ.

(Decided April 9th, 1882.)

Discharge in insolvency.—Schedule of claim.—Designation of debt.

DEFENDANTS were sued on a promissory note made to the solicitors of the plaintiff and by them endorsed to plaintiff. They pleaded a discharge under the insolvent act of 1869. Two of the defendants produced a supplementary list of creditors alleged to have been filed a few days before the date of the discharge, which list did not give the residence of the parties scheduled or state the nature of the debt or whether direct or indirect, but was simply a bald statement of names and amounts and it was not shown that any schedule to which it professed to be supplementary had ever been filed in the manner required by the act. The third defendant produced no schedule but stated that he had sent it to his solicitor to be filed. There was no proof that the solicitor had received it or that it had been filed; and, on secondary evidence being allowed it, was shown that the debt had been scheduled as due to the solicitors instead of being scheduled as due to plaintiff.

Held, that the discharge in insolvency did not release the claim.*

Rule to set aside verdict for plaintiff. The action was upon a promissory note made by defendants, payable to the order of Smith and McCoy, the plaintiff's attorneys, and given in renewal of a previous note, which was made in favor of the plaintiff personally. The renewal note was endorsed by the plaintiff's attorneys:—

"Pay to Mary Knaut or order.

(Sd.) SMITH & MCCOY.

Without recourse to us;"

and was retained in their possession for collection. After the giving of the latter note the defendants made an assignment under the *Insolvent Act of 1869*, and, eventually, obtained their discharge. In the schedule of liabilities filed by the defendants after making the assignment the note in question was not referred to, but a supplemental list was filed which included the names "Smith and McCoy" with the amount, "\$520," without any further particulars.

The pleadings are set out in the judgment of the Court. The rule was argued January 21st, 1882, by Graham, Q. C., and McCoy, Q. C.

Graham, Q. C., in support of rule.—Sponagle & Tupper, the makers of the note, became insolvent. In their supplementary statement of liabilities they entered the name, "Smith & McCoy, \$520." The note which this entry repre-

* The other points referred to in the judgment were decided chiefly on the evidence.

sented was made to Smith & McCoy, handed to them, and never delivered by them to Mrs. Knaut at all. (MCDONALD, C. J.—Then the question is whether Mrs. Knaut had notice through her agents, Smith & McCoy.) That is one point. Nothing was submitted to the jury. (MCDONALD, J.—It must be assumed that anything essential to your case was found against you; the question of stamping, for instance, which was raised on the pleadings.) When a jury find a general verdict we can look to the judge's charge. (RIGBY, J.—We must assume that he put the same questions to himself.) There was no sufficient delivery of the note to Mrs. Knaut. The endorsement alone is not sufficient. *Chitty on Bills*, 168. (RIGBY, J.—Smith & McCoy might have sued in their own name, or, having endorsed the note, would hold as Mrs. Knaut's agents, and could sue in her name.) They would have the right to erase the endorsement, and that is the test. (MCDONALD, J.—I doubt that very much.) Cites *Insolvent Act of 1869*, sections 98 and 105. The insertion of Messrs. Smith & McCoy's name in the supplementary schedule was sufficient notice to them. *22 U. C. C. P.*, 31. It is proved that Mrs. Knaut had actual notice, and, under the case just cited, the specification in the schedule was sufficient. See also, on same point, *29 U. C. Q. B.*, 506. (RIGBY, J.—The statement in the schedule was as bald as possible.) The name and amount are sufficient.

McCoy, Q. C.—As to delivery of note, see *Chalmers on Bills and Notes*, p. 43. The delivery to Mrs. Knaut, for the purpose of stamping, which she did, was an actual delivery. *7 H. & N.*, 686. She says, further, that she authorized the action to be brought in her name. See *2 H. & N.*, 222, as to meaning of the word "endorsement." The defendants knew that the plaintiff was the holder and wrote to her asking time. To discharge them from that claim her name should have appeared in the schedule. The section of the Act of 1869 in regard to the schedule is section 2, referring to Form B. This requires the name, residence, nature of debt, and amount to be stated. The insolvent must assist in the preparation of the schedule and swear to it. Section 98 refers to the consent. The supplemental list must be of the same nature and sworn to in the same way as the first list. The supplementary schedule

was neither signed nor sworn to. *King v. Smith*, 19 U. C. C. P., 323. The supplemental list must be filed in time to enable creditors to obtain a dividend. The defendants allege that Smith & McCoy were the lawful holders, and, as such, their name was placed in the schedule. A holder is a person who holds in his own right. Defendants knew at the time who the holder was and to whom the debt was due. The third plea does not set out that the name is in the schedule. (RIGBY, J.—The name of Smith & McCoy, on that schedule, could mean nothing else than the note in question.) 9 C. B., 46. (McDONALD, C. J.—*Hutt v. Sutherland*, 2 R. & G., sustains Mr. McCoy's contention as to the scheduling of the note. *Graham, Q. C.*—The creditor's name was not there at all.) I have a stronger case than that. 5 L. R., Ch. D., 921; 41 L. T., N. S., 193; L. R. 10 Ch. Ap., 204; L. R., 2 C. P. Division, 281. As to double stamping see 2 R. & C., 282; 3 R. & C., 389; 2 P. & B., 568; 24 U. C. C. P., 538. The 13th section of chapter 17 of the *Dominion Acts of 1879* says that any holder can double stamp, affixing his initials, and, if it appear to the satisfaction of the court or judge that it was through mere error or mistake that defective stamping occurred, the note or bill may be rendered valid by payment of double duty by stamps. The last clause does not require cancellation of the stamps at all,—and properly so. 3 *Pugsley*, 665 and 668. The plea that the note was not duly stamped is insufficient. 4 *Bing. N. C.*, 684. No replication of double stamping is necessary. 4 *Ontario Appeals*, 228, 233. The pleading is no notice to the holder of want of stamps. 2 P. & B., 572, 573, 577–8; 28 U. C. C. P., 222; 24 *Id.*, 526; 26 *Id.*, 21, 23.

Graham, Q. C., in reply.—*Preston v. Hunton*, 37 U. C. Q. B., 178, is a case where the endorser of a note had paid the bank before the assignment, but concealed the fact from the insolvent, and it was held that the naming of the bank which discounted the notes, in the schedule, was sufficient naming of the creditor. (McDONALD, C. J.—But there the insolvent described the debt according to his knowledge at the time, though he was mistaken.) 1 C. P., 267. The whole principle is one of notice. The schedule is a notice. Sections 105 and 106 do not require the creditors affected to be scheduled.

The previous sections refer to discharge by consent of scheduled creditors and creditors who have filed claims. The issue raised by the pleadings is simply that the plaintiff's name is not in the schedule nor in any supplemental list. 40 L. Times, 150, *Elmsly v. Corry*. There was notice to the attorney of the defective stamping, by the plea. 36 Q. B., 1.

MCDONALD, C. J., (April 9th, 1883,) delivered the judgment of the Court :—

In the year 1872 the plaintiff became the lawful holder, as indorsee, of a promissory note for the sum of \$1,000, made by the defendants, then doing business under the name and style of Sponagle, Tupper & Co. On maturity of the note the defendants were unable to pay it in full, and, at their request, the plaintiff agreed, through her attorneys, Messrs. Smith & McCoy, of Halifax, to renew. They were again unable to pay the renewed note when it fell due, and, after correspondence with the plaintiff and her agents, Smith & McCoy, on the 15th March, 1873, the balance due then being over five hundred dollars, the note in question in this suit was given in renewal, and sent to Messrs. Smith & McCoy, as the attorneys of the plaintiff. This last note, it will be observed, was made payable to the "order of Messrs. Smith & McCoy," and not to plaintiff, as the previous renewal had been, and Mr. McCoy says it was at once endorsed to the plaintiff, as follows :—

"Pay to Mary Knaut, or order.

(Sd.) SMITH & MCCOY.

Without recourse to us."

The paper was retained in the possession of Messrs. Smith & McCoy till it matured, when the defendants were informed by them that they had instructions from the plaintiff to enforce immediate payment, and, on the 2nd August, 1873, a writ was issued at the suit of the plaintiff on this note. The defendant firm became insolvent in or about the month of December, 1873, and made an assignment under the *Insolvent Act of 1869*. On the second day of June, 1875, the Judge in Insolvency for the County of Halifax granted a discharge under section 105 of that Act, to the defendants, Sponagle and

Tupper, and a similar discharge was granted to the other defendant, Benjamin, by the Judge for Insolvency for Halifax in December, 1876.

This action was commenced by writ of summons issued on the 21st December, 1876. The defendants, Sponagle and Tupper, pleaded :—

1. Plaintiff not the lawful holder of the note.
2. The discharge under the *Insolvent Act* above mentioned.

The defendant, Benjamin, pleaded, in addition to the above pleas :—

1. That Smith & McCoy did not endorse the note.
2. Note not duly stamped.
3. That defendant did not know that the plaintiff was holder of a note, and that he placed Smith & McCoy's name on his schedule as creditors for the amount.

To these pleas the plaintiff replied, denying the allegations and issues tendered, and alleging that the defendants were not released, because they did not place the plaintiff's name as creditor for this or any other debt in their schedule or supplementary list, as required by the statute.

At the hearing three points were taken for the defendants :

1. No endorsement of note to plaintiff.
2. Note not duly stamped.
3. The discharge in insolvency is a release and discharge from the debt.

We are all of opinion with the plaintiff on the first point, and that Smith & McCoy retained the note as the agents and attorneys of the plaintiff, and for her benefit, and, under the evidence, we can entertain no doubt that the defendants were aware of that fact. The objection to the stamps was not pressed by Mr. Graham at the argument, and we are of opinion that under the evidence and authorities the double stamping at the trial was properly allowed and was sufficient.

We then come to the real question in the cause, viz., did the discharge in insolvency operate as a release and discharge of this debt, or, in other words, was the debt sued for "mentioned or set forth in the statement of the defendants' affairs

exhibited at the first meeting of their creditors, or shewn by any supplementary list of creditors furnished by the insolvents previous to such discharge." &c. By section 3 of the Act of 1869 the assignee is directed, previous to the first meeting "to prepare and there exhibit statements shewing the position of the affairs of the insolvent, and particularly a schedule, form 'B,' containing the *names* and *residences* of all creditors, and the amount due to each," &c. By section 7 this schedule is to be annexed to the deed of assignment. By the Act of 1875, this statement shall be prepared by the creditor, but need not be attached to the deed of assignment; and, by section 17 of the last-mentioned Act, the statement or schedule required is substantially the same as that under the Act of 1869. It shall contain a correct statement (form F,) of all his liabilities, direct or indirect, contingent, or otherwise, indicating the nature and amount thereof, together with the names, additions and residence of their creditors, and the securities held by them, so far as may be known to the insolvent. The supplementary list of creditors authorized by section 98 of the Act of 1869, and section 61 of the Act of 1875 must, I think, be as full and explicit in the information furnished by it as is required in the original statement or schedule. It must afford the information required by forms B and F, in the Acts of 1869 and 1875 respectively. In this case there is no satisfactory evidence that any schedule or statement was filed at the first meeting of creditors or annexed to the deed of assignment, as required by section 7 of the Act of 1869, and it may well be questioned, I think, whether, under the Act of 1869, a supplementary statement, so called, in its terms meeting the requirements of the statute, can be admitted in evidence, or should have been received by the Judge in Insolvency in the absence of proof that the schedule to which it professes to be only supplementary, has been filed as required by the statute. If it be correct to say that the supplementary schedule must be as full and explicit as the statute requires the original schedule to be, it is clear the defendants must fail. The defendants, Tupper and Sponagle, produced at the trial a copy of a supplementary list, alleged by them to have been filed a few days before the date of their discharge. This paper is deficient in nearly all the elements made essential to the

schedule by the Act. It does not give the residence of the parties, or state the nature of the debt, or whether direct or indirect. It is simply a bald statement of names and amounts. The defendant, Benjamin, produced no copy of his schedule, but, in his evidence on the trial, stated that he had sent a schedule to his solicitor in Halifax, to be filed. There was no evidence whatever that the solicitor had received the paper or that it had been filed or annexed to the deed of assignment. The learned Judge who tried the cause, on proof of loss satisfactory to him, admitted evidence of the contents of this paper, which is the only evidence relied upon by Benjamin to prove his pleas. He says: "I kept no copy (of the schedule); it contained this note to Smith & McCoy; I only knew Smith & McCoy in the transaction; the amount of the note was set out in the papers as near as I could get at it." It then first appears that when applying for his individual discharge in the County of Lunenburg, he filed a schedule in which he included a claim due to Smith & McCoy, stated to be on a judgment for \$500. I do not think the rights of parties can be concluded by proceedings so carelessly and insufficiently conducted as these appear to have been, or upon evidence so imperfect and unsatisfactory as we have before us in this case. I do not think the defendants have satisfactorily proved the allegation of their pleas that this debt was included in an original or supplemental schedule, as required by the Act, and, in my opinion, their discharge by the Judge in Insolvency has not released them from the plaintiff's claim.

It was suggested at the argument whether a discharge by the Judge after a year did not release from all liabilities whatever, but although an opportunity was afforded them to do so, counsel did not appear disposed to support such a contention. The rule will be discharged, with costs.

CROSSKILL v. THE "MORNING HERALD" PRINTING
AND PUBLISHING COMPANY.

Before McDONALD, SMITH and WEATHERBE, J J.

(Decided April 9th, 1883.)



Defects in declaration cured by pleading.—Immaterial averment of office where words actionable per se.—Functions of jury.—Damages.

THE declaration set out that the defendant company falsely and maliciously printed and published of the plaintiff in relation to a certain office held by him as Deputy Provincial Secretary, in a certain newspaper, &c., and which said article appeared in the editorial columns of the *Morning Herald*, &c., and was as follows, viz., (the article being then set out at length.)

Held, that although no "article" had been mentioned in the count to which the words "which said article" could refer, the defect was cured by pleading over and particularly by justifying the publication.

Held, further, that although the defamatory matter was charged as having been published of the plaintiff in relation to his office, it was no objection to the verdict for plaintiff that the fact of plaintiff holding such office was not proved, as some of the words used were actionable in themselves, and the innuendoes showed that the object of the suit was to recover damages sustained by plaintiff out of office by reason of charges made against him of alleged improper conduct while in office.

Held, also that the evidence of publication (q.v.) was sufficient to go to the jury, and it was no misdirection to leave the question of publication to the jury under such evidence, and that the damages, (\$3000,) were not excessive, in view of the serious charges contained in the article and the subsequent conduct of the defendants.

This was an action brought against the defendant company for an alleged libel. The first count of the declaration was as follows:—

That the defendant falsely and maliciously printed and published of the plaintiff in relation to a certain office held by him as Deputy Provincial Secretary of the Province of Nova Scotia, in a certain newspaper of the defendant company called the *Morning Herald*, and printed and published by them in the City of Halifax, and dated Wednesday, the twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and which said article appeared in the editorial column of said *Morning Herald* newspaper, under the caption "Concerning Martyrs," and is as follows:—

"Our morning contemporary has at last created a veritable Grit Martyr in the person of Mr. Herbert Crosskill, (meaning the plaintiff). It first tells the awful story of his (the plaintiff's) martyrdom, and then decks him (meaning the plaintiff) with the white robe and the crown, and lastly turns upon his persecutors, and with its prophetic soul inspired with divine

afflatus, and its eye enlightened by a vision of the future, predicts the most terrible woe and desolation in store for Hon. Mr. Holmes and his unfortunate colleagues. We are sorry that our duty as journalists compels us to dissipate such a really fine effort of genius, and to completely destroy Mr. Herbert Crosskill's chances of a martyr's crown. But the truth must be told, even if better things than Mr. Crosskill fall, and the truth in this case is very damaging both to our contemporary and its hero. Mr. Crosskill was appointed in 1867, when his party came into power. He possessed not one solitary qualification for the office, further than that he was a renegade from our party, and, like all renegades, was unusually bitter, violent and unscrupulous. His selection caused no little surprise at the time, but ceased to do so when it became known what manner of men he was required to serve, and the kind of services that Messrs. Annand and Vail required of him. For eleven years the Provincial Secretary's office has been a sink of iniquity, where public robbery ran riot, and where political villainy of almost every species was concocted and perpetrated. In all this Mr. Crosskill was a willing and active participator. The Messrs. Annand may perhaps be excused for bemoaning him, for he was a man after their own heart, both in his public and private life, and many a time has he no doubt served their purposes. Out of his office Mr. Crosskill was a loud-mouthed and violent partizan, ridiculing Hon. Mr. Holmes and his colleagues in the coarsest Billingsgate. To suppose that such a man, (meaning the plaintiff,) could be retained by any body of gentlemen in a confidential position is really astounding. The government might as well think of having the editor of our contemporary himself as their confidential clerk as have such a man in the office of Deputy Provincial Secretary. The pretence that the late government never dismissed men for political reasons is utterly untrue. What were Messrs. Kinnear and Purdy, of Amherst dismissed for, but simply that they refused to vote for Mr. Annand? Why was Mr. Rowley, of Yarmouth, dismissed? Why were Messrs. George and Parsons dismissed? and why were scores of other able and honest officials all over the province dismissed, but simply for their politics? The MacKenzie Government did the same thing. Take the case of Mr. Charles Almon, for

instance, who, after having held the office of Surveyor of Shipping for this port for six years, was dismissed without cause a few weeks after the change of government in 1874. There was no talk about "Americanizing" our institutions then. In all of these cases the officers dismissed were honest and faithful, elements that are certainly lacking in the case of Mr. Herbert Crosskill. If that person's name is to be placed on the roll of martyrs it must be in the same list with that of the chief baker whom Pharaoh hung." The said defendants meaning thereby that the plaintiff was guilty of public robbery and almost every species of villainy, and in all of which the plaintiff was a willing and active participator.

The defendants, in their first and second pleas, denied the publication of the alleged defamatory matter, and for a third plea pleaded that shortly before the publication of the said alleged defamatory matter, and for several years previous thereto, the plaintiff had been Deputy Provincial Secretary for the Province of Nova Scotia, and, upon being dismissed from such office by the Government of Nova Scotia, had publicly charged such government with malfeasance and injustice by reason thereof, and had caused a newspaper in the City of Halifax, to hold him, (the plaintiff,) up as a public martyr, and the defendants, in answer to such charges and complaint, wrote and published the words in the said declaration complained of as part of an article in the *Morning Herald* newspaper, and such words were a fair and *bona fide* comment on the conduct of the plaintiff in such public capacity as aforesaid, and were published without any malice on the part of the defendants.

The cause was tried before McDONALD, J., at Halifax, in April, 1880, when the jury found for the plaintiff, with \$3,000 damages. A rule was taken to set the verdict aside, on the following grounds:—

1. Because the said verdict is against law.
2. Because the said verdict is against evidence.
3. Because of the improper reception of evidence.
4. Because of the improper rejection of evidence.
5. Because of the misdirection of the learned Judge who tried this cause.

6. Because the damages awarded by the jury herein are excessive.

7. Because there was no proof of the publication of the alleged libel by the defendants.

8. Because the declaration did not allege what defamatory matter was published of the plaintiff.

9. Because the declaration did not set up any cause of action against the defendants.

10. Because no defamatory matter was alleged to have been published concerning the plaintiff, except such as related to him as the holder of an office which he did not fill at the time of such alleged publication.

And on grounds taken on the motion for nonsuit and during the trial, unless cause to the contrary be shewn before this Honorable Court within the first four days of the next ensuing December Term or session of this Honorable Court.

The rule was argued April 17th, 1882, by Sedgewick, Q. C., in support of rule, and Weeks and Pearson, *contra*.

MCDONALD, J., (April 9th, 1883, after reciting the matter complained of, and the pleas and the grounds contained in defendants' rule,) delivered judgment as follows :—

As it is more convenient, first, to consider those objections which, if upheld would be fatal to the plaintiff's case, on the pleadings, I will not follow the order in which the grounds are taken in the rule *nisi*, but will now examine the eighth and ninth, which are exceptions to the declaration.

At the argument it was urged that the peculiar wording of the first part of the different counts cannot amount to an allegation that the defendant company published the libellous words of and concerning the plaintiff; that there is no "article" previously mentioned, to which the words "said article" as used could refer, and that, for want of a proper allegation, the plaintiff cannot succeed. It must be admitted that, to say the least of it, the several counts are informally drawn in the respect mentioned, but we have now to deal with the pleadings as a whole, the declaration and pleas together, without demurrer, either general or special; and the answer to the defendant's objection is that any defects which may have existed in the declaration are cured by the

defendant's pleas and by the verdict. "A defect in pleading is aided, if the adverse party plead to or answer the defective pleading in such a manner that an omission or informality therein is expressly or implicitly supplied or rendered formal or intelligible. 1 *Chitty on Pleadings*, 703. At page 704 the author says that "where a particular fact has been informally alleged and the opposite party, in pleading over, admits the particular fact, either by pleading to some other matter alleged in the defective pleading or pleading in confession and avoidance of the matter so informally alleged, the defect will be aided by the admission resulting and to be gathered from such subsequent pleadings." After citing numerous authorities, he says: "It is, however, unnecessary to make any further mention of these cases which have been decided with reference to aid of mere formal defects by pleading over, for we have seen that, at the present day, by virtue of the statutes relative to demurrers, in all cases where any pleading is defective and the other party demurs generally, he will be entirely precluded from availing himself afterwards of any formal defects in such previous pleading by the mere act of his having *omitted to point out such defects upon a special demurrer.*" * * *

"With regard to a defect in substance, it seems that it can be completely cured by the mere effect of pleading over thereto." At page 419 he says: "But where a colloquium is laid and there is an innuendo of the plaintiff, it seems that the want of a direct averment that the words were spoken of and concerning the plaintiff must be pointed out by special demurrer, and that it will be intended, after verdict or upon general demurrer, that the words were spoken concerning the plaintiff." It will be presently seen that our statute having provided that, with the exception therein mentioned, no pleading shall be deemed insufficient for any defect at the time of the passing thereof objectionable on special demurrer only, and having provided another course to be adopted in the exceptional cases, that course ought to be pursued whenever such cases arise. Again, having reference to the effect of a verdict, he says, at page 711: "We have seen that an imperfect averment of the performance by the plaintiff of a *condition precedent* or matter to be performed by him, or that he gave a proper notice to the defendant or requested the defendant

to perform his promise, will sometimes be cured by verdict, and that after verdict an averment in a declaration for libel that the defendant 'printed or caused to be printed the libel in a newspaper,' not expressly shewing a publication, may be sufficient." * * * "The allegations on the record, taken by themselves, might have been ambiguous and have been capable of bearing two different constructions, but when they are coupled with the verdict, it became clear that they might and ought to be interpreted in that sense alone which was absolutely necessary in order to account for and support the verdict." He refers to numerous instances in which defects in pleadings may, at common law, be aided by verdict, independently of statutory enactments, and then proceeds to shew the operation of the statute of jeofails, to which it is not necessary to refer. See also *Taylor on Evidence*, 102. On this subject I may refer to the case of *Regina v. Waters*, 2 Car. & Kir., 866, which was for murder by a mother throwing a child upon a heap of ashes, and leaving it there, in the open air, exposed to the cold, whereby it died. The indictment did not allege that the child was of such tender years that it could not take care of itself, though if it was old enough to do so the crime would not be the same. The Court said: "In this case the jury could not have found the prisoner guilty without actually negating the power of the child to take care of herself and escape the consequence of the unlawful act of the prisoner, and, consequently, after verdict that fact must be implied." Thus it will be seen that, even at common law, the objections taken at the argument to the declaration must fail, both because the defendant pleaded over and by his third plea justified the writing and publishing of the words complained of, and because the defect is cured by legal intendment after verdict in the plaintiff's favour. The declaration and the pleas together, not the declaration alone, comprise the issues which had to be submitted to the jury, and the jury have found them, as raised by the pleas, in the plaintiff's favour. But if this be the position of the case under the practice in England, the contention of the defendant is much less tenable when we turn to our own *Practice Act*, section 116, which, although requiring that the matters relied upon shall be clearly and distinctly stated, provides that it

shall not be necessary that such matters shall be stated in any technical or formal language or manner, or that any technical or formal statement be used." Section 121 provides that, even on demurrer, the Court shall proceed and give judgment according as the right of the case and matter in law shall appear to them, without regarding any imperfection, defect in, or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form. Section 123 provides that "except in the cases hereinafter particularly mentioned, no pleading shall be deemed insufficient for any defect now objectionable on special demurrer only;" and section 121 shews that those particularly mentioned cases are of duplicity, argumentativeness, and uncertainty, and provides that when they embarrass the opposite party he may apply to a judge, by summons, to compel an amendment; and if the party pleading them will not amend, according to the judge's order, the opposite party may demur upon the grounds mentioned in the summons, and those only. The course thus pointed out was open to the defendant up to the time he pleaded, and it is not necessary to say with what probable result.

That the learned counsel who drafted the pleas understood the declaration to charge his client with the printing and publication of the words complained of admits of no reasonable doubt, else he would not have justified the printing and publication of the words in the terms of his third plea. Taking the issue as it stands, the question to be tried is rendered intelligible. It was objected that, while the declaration charges that the alleged libel was of the plaintiff in relation to his office, there is no proof that such office was held by him at the time, but I cannot gather from the record that it was intended to recover damages for only loss of office, or injury to the plaintiff while he held it. It simply charges the defendant with having printed and published, of the plaintiff, in relation to his office, words which, in or out of office, were calculated to degrade and hold him up to hatred, ridicule and contempt, and which, moreover, if true, would render him liable to a criminal prosecution, with the legal consequences of a conviction. That some of the words, when printed and published, are clearly actionable in themselves is

unquestionable, and the innuendoes shew that the object of the suit was to recover damages for injuries sustained by the plaintiff, out of office, by reason of charges made against him of alleged improper conduct while in office. The case of *Goodburne v. Bowman et al.*, 9 Bing., 692, is entirely in point. It was an action brought for a libel, charging a mayor, after he ceased to be such, with improper conduct in his office, and the plaintiff recovered damages,—small, it is true,—but still damages. “Where the words are only actionable as having been spoken of the plaintiff in a particular character, such character must, if put in issue by a special plea, be proved; but if the character be immaterial, or be not traversed, no evidence need be given of it.” *Roscoe’s N. P. Ev.*, 746; *Lewis v. Walter*, 3 B. & C., 138. Here the particular character is immaterial, and it is not put in issue by a plea. See also *1 Chitty on Pleading*, 416. At page 417 we read: “But where the slanderous matter is actionable of itself, and independently of the plaintiff’s profession or trade, it will not be fatal to introduce an averment of the plaintiff’s profession, &c., and to state that the matter was published of and concerning him, *and of and concerning him in his profession*, &c., for the averment is divisible.” This I regard as decisive of the point now under consideration. See also *Folkard on Libel and Slander*, 338. In *Hemming v. Gasson*, El., Bl. & El., 346, Lord CAMPBELL said: “Upon the first point, in arrest of judgment, we are of opinion that section 61 of the *Common Law Procedure Act, 1852*,” (equivalent to section 165 of our *Practice Act*,) “and the two forms in schedule B to that Act, enable the pleader to put any construction he pleases upon the words complained of, by innuendo, and that it was for the jury to say whether the words were spoken with such a meaning.” In *Watkins v. Hall*, L. R. 3 Q. B., 402, BLACKBURN, J., said: “These latter words,” (in section 61), “I can put no other meaning on than that the legislature enacted that a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning, shall be taken as if there were two counts, one with the innuendo and one without the innuendo, and if the plaintiff prove either it will be sufficient.”

It was also contended that there was misdirection, because the question of publication was submitted to the jury, and I must confess that I was somewhat surprised at the broadness with which that proposition was laid down. To hold that, however doubtful, complicated or contradictory the evidence might be, the Judge should take the responsibility of deciding the question of fact, is a thing that I was not prepared to do; and having since examined authorities, though none were cited, on that point, I am far from being able to change my opinion. Taylor, in his work on Evidence, page 36, referring to the functions of a judge as distinguished from those of a jury, and citing many decisions, says: "It was then laid down as a distinct principle that where the evidence was by law admissible for the determination of the point raised, the judge was bound to lay it before the jury; but whether the evidence was admissible or not was a matter for the decision of the judge alone. In all these cases, however, after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty to consider all the circumstances of the case, including those already proved before the judge, and to give the evidence only such credit as they think it may deserve." He cites *Lewis v. Marshall*, 7 M. & G., 744, in which it was said by TINDAL, C. J., giving the opinion of the Court: "Upon the first point we take the acknowledged distinction to be this, that if the evidence offered at the trial is evidence by law admissible for the determination of a question before the jury, the judge is bound to lay it before them and to call upon them to decide upon the effect of such evidence; but whether such evidence, when offered, is of such character and description which makes it admissible by law is a question which is for the determination of the judge alone, and is left solely to his decision."

Even when a question of law, which is to be decided by the Judge who tries a cause, depends upon doubtful or contradictory evidence, the question of fact ought to be submitted to the jury, and the legal decision should be the result of their finding upon the facts submitted; *Cook v. Wylde*, 5 El. & Bl., 329; *Taylor on Evidence*, 37 to 40; *Panter v. Williams*, 2 Q. B., 169; *Turner v. Ambler*, 10 Q. B., 252. Whether there is any evidence, is a question for the Judge, *Hodges v.*

Ancrum, 11 Ex., 316; but whether the evidence is sufficient is a question for the jury; *Broom's Legal Maxims*, 7th Am. Ed., 107. And, at page 106, the author says, "In cases of libel also, it has been the course, for a long time, for the Judge first to give a legal definition of the offence and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction, and this course is adopted whether the libel is the subject of a criminal prosecution or of a civil action. In *Johnston v. Hudson & Morgan*, (reported in the American reprint of the E. C. L. R., No. 34;) 7 Ad. & El., 233, the question of publication was left to the jury by the Lord Chief Justice and a verdict given for the plaintiff, which verdict was upheld by the whole Court. In *Delacroix v. Thevenot*, 2 Starkie, 63, the libel was sent in a letter written by the defendant to the plaintiff; proof that the defendant knew that letters sent to plaintiff were usually opened by his clerk was held evidence to go to a jury of the defendant's intention that the letter should be read by a third person, which would amount to a publication. In *Regina v. Lovett*, 9 Car. & P., 462, it was ruled that if the manuscript of a libel is proved to be in the handwriting of the defendant and it is also proved to have been printed and published, this is evidence to go to a jury that it was published by the defendant, although there was no evidence to show that the printing and publishing were by his direction. In that case the whole question of publication was left to the jury. In *Fryer v. Gathercole*, 4 Ex., 262, to prove publication, a witness was called who stated that the defendant gave her a copy of the pamphlet, that she lent it several times to persons expecting that they would return it, that the persons to whom she lent it had returned it, but that she could not swear that it was the very same, though she had no reason to doubt it; held, that there was evidence for the jury that the pamphlet returned to the witness was the same given to her by the defendant. In *Chubb v. Flannigan*, 6 Car. & P., 431, PARK, J., in summing up said, "There are four questions for your consideration in this case,—the first, whether the defendant published the articles complained of," &c. I do not think it necessary to cite more cases on this point, but it now appears to me as it always did, that the course pursued at the trial,

in leaving to the jury the question of publication, in the manner in which it was left, was, under the peculiar nature of the evidence, the only one which could be legally pursued, and that if it had been withdrawn from them altogether there would be good ground to overrule such a decision. Surely it will not be contended that there was no publication of this libel by some one, nor can it be fairly contended that there was no evidence to connect the defendant company with that publication. The jury were told, substantially, and, as I think, correctly, that much of the difficulty which often occurs in proving the connection of individual defendants with newspaper publications, in actions of this kind, was obviated by the fact that the defendant corporation was authorized by statute, presumably passed at the corporators' own instance, to publish a newspaper identical in its name with the one in proof; that the defendant company had its legal existence under the name by which it is now sued, of the "*Morning Herald* Printing and Publishing Company," and for the purpose, among others, of printing and publishing the paper in question, and that it was a question for them whether the paper put in and read was a genuine one issued by that company, or a spurious one purporting to be what it was not; and that if they thought it was spurious they had a right to find for the defendant, although the paper was received and read. The correctness of that summing up was not questioned at the argument, excepting so far as it referred to the right of the jury to pass upon the evidence, and with that I have already dealt. The defendant company being the only party having, by statute, the legal right to publish the paper containing the libellous words, coupled with the proved fact that it was found published in the City of Halifax, in which the statute provides that the principal office of its publication shall be, and simultaneously with the publication and issuing of what is proved genuine issues of the defendants' paper of the same name, date, and contents,—it might be contended, with considerable force, that that alone furnished sufficient *prima facie* evidence of publication by the defendants to enable the plaintiff to recover. Indeed, to my mind, the statute referred to accomplishes, for the plaintiff, the principal advantages formerly gained in England by complainants

under section 6 of the Act, 6 and 7 William IV., chap. 76, which required declarations specifying the names of the printers, publishers, and proprietors, and describing the printing house, house of publication and *title of the paper* to be delivered to the stamp commissioners. We are not obliged to decide the case, however, solely from that point of view; but, quite independently of the Act, there is sufficient evidence to go to the jury as it was submitted.

I have already, for the purpose of showing that there was no misdirection, referred to several cases of libel in which evidence, not so strong as this, was held fit to be submitted to juries, and in which their verdicts against the defendants were upheld, as will be seen by reference to these cases; *Regina v. Lovett*, 9 C. & P., 462; *Fryer v. Gathercole*, 4 Ex., 262; *Chubb v. Flannigan*, 6 C. & P., 431; *Lewis v. Marshall*, 7 M. & G., 744. But the case which seems to me to be decisive is that of *Johnston v. Hudson & Morgan*, already referred to, 7 *Ad. & El.*, 233. In that case COLERIDGE, J., said, "There is no rule of law respecting the proof of identity peculiar to the case of a printed paper; the evidence may depend upon correspondence in size, appearance and other circumstances." And Lord DENMAN, C. J., said, "If we drop from our recollection that this was a printed paper and examine the question of its identity as we would a bale of goods, it is clearly impossible to say that there was not some evidence. Then there is evidence that Hudson and Morgan dealt together, and that their dealings comprehended the printing by Morgan of some paper which was published by Hudson." In the case before us there is conclusive evidence that the dealing between Connolly and the defendant company comprehended the selling by the former of the papers printed by the latter, under an Act of the Legislature. Mr. Sedgewick was one of the promoters of the *Herald* Printing and Publishing Company and one of its members. He read the *Herald* every morning and is a subscriber to it. Though not recollecting distinctly, he has no doubt he read the article complained of, probably in a paper coming to his house. He says, "I have no doubt I read it in the paper so received. I received the *Morning Herald* newspaper in my house every day. I have no doubt I read this same article in that paper." He is the defendant's

attorney on the record and was served with a notice to produce the "files of the *Morning Herald* newspaper issued on the 20th November, 1878," and "a certain printed paper containing the words charged in the declaration." He refused to do so and assigned as a reason, not that it was not within his power or that of his client to do so, but, in his own words, "I refuse to answer, as professional adviser." "Generally, there is a fair presumption against a party who keeps back a document in his possession;" *Roscoe's N. P. Ev.*, 36; *Attorney-General v. Windsor*, 24 Beav., 679. Referring to the paper in evidence, he had previously said, "I presume this is a copy of the *Morning Herald* newspaper, because I do not assume that it is a forgery"—"I see nothing to induce me to doubt this is a genuine paper. I have no doubt that this paper is what it purports to be." And yet the Court and jury are asked to ignore the truth which Mr. Sedgewick told, and which every intelligent person who heard the evidence must believe to be the truth. We would not be asked so to ignore it "if (as Lord DENMAN said,) we dropped from our recollection that this was a printed paper," &c., and in reference to which COLERIDGE, Justice, said that there is no rule respecting proof of identity peculiar to its case. It is true that in *Johnston v. Morgan et al*, the paper from which the libellous article was read, or rather sung, had been lost, and that it therefore became necessary to give secondary evidence of its contents; but here we have the libellous article read by Mr. Sedgewick in what he has no doubt was a genuine number of the *Morning Herald*, received by him as subscriber in due course. That paper, if produced, would have been primary evidence to go to the jury, be the effect what it might, and Mr. Sedgewick was served with a notice to produce. His refusal so to do, whether privileged as legal adviser or not, lets in secondary evidence; and, in this view of the case, it matters not that he was one of the promoters of the corporation now by law authorized to carry on the business of printing and publishing the paper in question; nor that, after action, he became the attorney of the defendant company in this cause, while there is no room to doubt that the paper put in and read is a duplicate copy of that which he read after having received it as a subscriber in due course. Then Mr. Connolly,

who sold the *Herald* for the defendant since the commencement of its publication, and settled with an accredited agent weekly, returning back to the office the unsold papers, has no doubt that he read the article in question, in his shop, on the morning of its publication. Both he and the plaintiff say that his clerk was sent to buy a copy of it in the *Herald* office, and that the messenger returned with the paper marked H. McD. 1, which is fully identified. Robert Murray, who was a practical printer and "familiar with the type and make-up," was engaged in the *Herald* office from 1875 to 1878. He says, "I have no doubt that this paper is a genuine copy of the *Herald* of the 20th of November," "I could swear to any Halifax paper, without seeing the name, by its general appearance." Thomas Brophy, a practical printer, employed in the *Herald* office for five years, including the date of the publication in question, looks at the paper received and read, and says, "I have no doubt that this is an exact copy of the *Herald*," &c., and says the same of paper No. 3, also received. Charles Annand, connected with the press for sixteen years, says, "It would be impossible for any office in Halifax to forge the paper in a day"; and, yet, we find this article read between half-past nine and half-past ten in the forenoon, in what is called a forged paper, issued simultaneously with what are admitted to be genuine numbers of the *Herald*, both containing the libellous matter.

Can there be any doubt that the paper referred to as read by Connolly was one of those sent to him for sale by the defendant company? I think not. And if he returned to the office, as he says he did, the unsold papers, they are not within his control nor that of the plaintiff. The defendant having refused to produce any of the returned papers, under the notice to produce served upon the attorney, paper No. 1 is receivable as secondary evidence, even if not receivable as primary; the identity of the two having been first proved. "Though all information must, if possible, be traced to its fountain head, yet, if there be several distinct sources of information of the same fact it is not, in general, necessary to show that all have been exhausted before recourse can be had to secondary evidence with respect to one of them;" *Taylor on Evidence*, 399, and the authorities there referred to. And

if Connolly did not read the article in question in the papers sent to him for sale, it follows that it must have been in paper No. 1 that he read it; in which case that paper is primary evidence, while the fact that it is identical with the papers sent to him by the defendant for sale is ample evidence for a jury of its being printed and published by that company. Although objection was taken that evidence was improperly received and improperly rejected, no authority has been cited to support that contention, but there is abundant authority to the contrary, some of which has already been referred to.

The only remaining question then is that of damages, which to many may, at first sight, appear to be high; but it must be remembered that the libel was exceedingly offensive and entirely unfounded and unprovoked, so far as appears by the evidence. The plaintiff was charged, among other things, with being a willing and active participator in an office which, for eleven years, was a sink of iniquity wherein public robbery ran riot and where political villainy of almost every species was concocted and perpetrated. He was charged with lacking fidelity and honesty, and the libel ended by declaring that, if his name was to be placed on the roll of martyrs it must be in the same list with the chief baker whom Pharaoh hung; all this, as appears by the libelous article itself, for no other or better reason than that the *Morning Herald* was displeased with something that appeared in another newspaper without, so far as the evidence shows, the knowledge or consent of the plaintiff; and at a time, too, when such a libel was likely to work peculiar hardships,—shortly after he was dismissed from an office which he had held for eleven years, and had to make his living in the world as best he could. The defendants' plea of justification does not aid them with respect to the question of damages. Under all the facts as proved, there being in this case no certain measure of damages, it was for the jury to assess them at what they deemed right, and I do not think that we can say that they are outrageous, or that the jury acted under the influence of undue motives or of any error or misconception, so as to warrant us in setting aside the verdict as excessive. To do so a very clear case must be made out. *Chitty's Archbold's Practice*, 1524, and authorities there cited. There can be no doubt that the

degree of insult may vary according to the station in life of the party. *Price v. Severn*, 7 Bing., 319. Here the station in life is evidenced by the fact that the plaintiff for eleven years occupied the respectable and responsible position of Deputy Provincial Secretary. "The court will not interfere with the damages unless they are grossly disproportionate to the injury sustained." *Williams v. Currie*, 1 M. & G., 841. If, as it was held, £1,000 sterling (\$5,000) for false imprisonment under warrant of the Secretary of State, and the same amount for a forcible entry into a dwelling house, and staying there three or four days, and distraining to enforce an unfounded claim to property were not so excessive as to warrant the interference of the court, I do not see how, in this case, we can consider \$3,000 damages so excessive as to warrant us in interfering, in view of the serious charges that have been made against the plaintiff and the subsequent conduct of the defendant company in reference thereto.

For the reasons given, I think that the rule *nisi* to set aside the verdict must be discharged, with costs.

DESBARRES v. TREMAINE.

Before McDONALD, SMITH, and WEATHERBE, JJ.

(Decided April 9th, 1883.)

Privileged communication.

DEFENDANT wrote to the Provincial Secretary a letter containing complaints and charges against the defendant in his office as sheriff. Defendant justified on the ground that, being a barrister of the Court and dissatisfied with the official conduct of the plaintiff he had written to said Provincial Secretary, being a member of the Government which had appointed and could dismiss the plaintiff, believing that the statements set forth in the letter were true and he alleged that the letter was written without malice. Plaintiff new assigned publication to other persons, but the letter so published was not clearly identified with the one on which the action was brought. The jury found for defendant.

Held, that the communication to the Provincial Secretary was privileged.

Per SMITH, J.—That although the letter contained expressions that might indicate malice, as the jury found for defendant, after the evidence on that point had been clearly put to them by the Judge, the verdict could not be set aside.

Per McDONALD and WEATHERBE, JJ.—That although the verdict was unsatisfactory there was not sufficient reason for disturbing it.

This was an action of libel brought by plaintiff, who was Sheriff of the County of Guysborough, against defendant, a barrister, for falsely and maliciously, in the form of a letter

addressed to the Hon. the Provincial Secretary, writing and publishing certain statements of the plaintiff and, of and concerning his conduct in his said office of sheriff. The defendant, in the letter referred to, after stating his desire to bring to the notice of the Government "the irregular and unsatisfactory manner in which the sheriff of this county performs, or rather, attempts to perform the duties of his office," charged the plaintiff with having made untrue representations to one of defendant's clients for the purpose of collecting certain fees to which he was not entitled, and which defendant had refused to pay. The concluding part of the letter was as follows :

"Is this the way a public officer should perform the duties of his office. Have not attornies and the public a right to expect that courtesy, fair dealing and honesty which should characterize every man holding a prominent and important public office? The fact is acknowledged on every hand that Mr. DesBarres will never do for the position, and I make the complaint conscientiously believing I am performing a duty. Was it right for the sheriff, in an underhand way, with false representations, to obtain the twenty dollars from Mr. Buckley, and without, up to this moment, saying to me what he had done, come and sign the deeds, and walk away with more money in his pocket than was justly and honestly due him? My charge is that Mr. DesBarres acts in such an arbitrary and unjustifiable manner that it is next to impossible to do business with him; that he has taken illegal fees and exacted them from my client in such a way as to be entirely reprehensible.

"In order that the sheriff may have a full opportunity of answering these charges, I have caused a copy of this letter to be made, and which will be handed him immediately. I have also read it to Mr. Buckley, in order that I might be perfectly correct as to the facts as far as he was concerned."

Defendant pleaded justifying the writing of the letter on the ground that being a barrister, and being dissatisfied with the manner in which the said plaintiff in certain matters referred to performed his duties, the defendant wrote the letter complained of to the Honorable Simon H. Holmes, the Provincial Secretary for the Province of Nova Scotia, as a member and the Secretary of the Government by which the

said plaintiff was appointed to his said office, and which Government had the power of dismissing the plaintiff from his said office, the defendant believing that the facts set forth in the said letter were true, and the same were written without malice, which said writing and publishing were the same writing and publishing of the said words as in the plaintiff's declaration mentioned.

Plaintiff new assigned a publication to divers other persons on other and different occasions, which defendant denied. The cause was tried before McDONALD, J., at Guysborough, June 1st, 1881. The principal evidence in support of the charge of publication to others than the Provincial Secretary, was that of William Kandick, who swore that in June, 1880, while in defendant's office, defendant read to him a letter, purporting to be addressed to the Provincial Secretary, complaining of the conduct of the sheriff. He could not, however, identify the letter in evidence as that read over to him.

The learned Judge, after explaining the nature of the action, charged the jury that the plaintiff, in the transactions referred to in the letter, had acted within the letter of the law, and that the charges made against him by defendant of dishonesty, unfair dealing and misrepresentation could not be supported. He pointed out to them all the facts, including the different passages in the publication itself, from which they might conclude, if they thought fit, that the letter was defamatory, and that such malice existed as would render it actionable and destroy the right which the defendant possessed of representing his grievances to the Government, if done in a different manner. He also instructed them that the defendant was privileged to read the letter in good faith and without malice to Mr. Buckley, who was one of his clients in the foreclosure suits, and as such interested in the result; but if he read it to Mr. Kandick, his doing so was entirely unjustifiable, the latter having no interest in the transactions referred to. The jury found a verdict for defendant, and a rule was taken to set the same aside, which came on for argument March 14th, 1882.

DesBarres in support of rule.—Our contention is, first, that the defendant's communication was not privileged, and,

second, that if it were the the language used was in excess of the privilege. The Judge misdirected the jury in telling them the communication was a privileged one. (WEATHERBE, J.—The Judge said nothing about this letter.) If he did not say so in so many words, he assumed it was by putting the question of express malice to the jury. The question of express malice only arises where the communication is privileged. Certain relations between the parties are necessary to a communication. *Odgers on Libel and Slander*, p. 226, citing *12 A. & E.*, 733; *15 C. B., N. S.*, 430; *L. R.*, 7 C. P., 623; *L. R.*, 4 P. C. C., 504. It was not necessary for the defendant to use the words he did. (MCDONALD, J.—Was he bound to use not one more word than was necessary?) I think the case from *L. R.*, 7 C. P., 623, goes that length. *44 U. C., Q. B.*, 380; *41 L. J.*, 590. As to rejection of evidence cites *9 C. & B.*, 718; *L. R.*, 4 P. C., 287; *15 M. & W.*, 319.

Weeks, contra.—There is a fatal variance between the declaration and proof, part of the letter being left out of the declaration which would modify the words set out; *L. R.*, 4 P. C., 287. The question of privileged occasion is for the Judge. He having found the occasion to be privileged, the question of express malice is for the jury, whose finding will not be set aside unless contrary to the Judge's charge. *L. R.*, 3 Q. B. Div., 237; *L. R.*, 4 Exch., 232; *Odgers on Libel and Slander*, 34, 40, 43.

Henry, Q. C., (with *Weeks*).—There is not a particle of evidence as to what was read to Kandick. If it was proved that the letter was read to Kandick, which the defendant had no right to do, he would be liable. The duty of the Judge requires him to admit only the best evidence where it is procurable. The notice to produce called for a paper which corresponded with a paper which was in evidence. When you give a notice to produce you must show that there is such a document, and that it is under the control of the party. If he parted with the paper before the service of the notice, the party serving it cannot say a word. Kandick, after looking at the letter, could not say it was the one read to him. There is evidence tending to show that the letter was shown to him, but it might have been some other, and it remained to the

Judge to leave the question to the jury. There was not enough evidence, however, for them to find for the plaintiff.

McCoy, Q. C., in reply.—The defendant's attorney said he had not the letter at the time of the trial, but it was admitted that it was in the defendant's possession when it was read to Kandick. It was the duty of the defendant himself to go on the stand and swear that the letter was not in his possession, and account for it. The statement of the attorney was not enough. If this was the only letter, and it was read to Kandick, it should have gone to the jury, who should have found for the plaintiff. If there was another letter and it was not produced, we could give secondary evidence, and the verdict cannot stand. The Court cannot presume that there was only one letter. Cites *1 Taylor on Evidence*, 394, as to secondary evidence. There was no other way for Kandick to identify the letter than by reading it, assuming that read to him to be the same as that sent to the Provincial Secretary. He knew of two of the charges, and by reading the letter might have been able to identify it from his knowledge of these. *El., Bl. & El.*, 345; *10 Moore*, 407. The facts set up by the defendant in justification are not proved; *3 B. & C.*, 566; *4 Bing.*, 679; *1 Ontario Appeals*, 495; *2 Bing., N. C.*, 372; *1 Hilliard on Torts*, 370.

SMITH, J., (April 9th, 1883,) delivered judgment as follows:—

In this case, the verdict, we think, must stand. The libel complained of we consider as a privileged communication made to the Provincial Secretary, in reference to the conduct of a public officer, which, if made in good faith, unaccompanied by any facts which would show express malice, would excuse the defendant from liability. It is just possible that this Court who heard the argument might have been disposed, if acting in the capacity of a jury, to think that there was evidence to be derived from some of the expressions used in the document complained of to indicate malice on the part of the defendant; but this was left most clearly and emphatically by the learned Judge who tried the cause, to the jury, and their finding must be regarded as negating any malicious motive on the part of the defendant. It was contended at

the trial and on the argument, that if the letter to the Provincial Secretary should be held to be privileged, still there was an unjustifiable publication to one Kandick. There cannot be a doubt that if the contents of the letter to the Provincial Secretary and the alleged libel set out in the plaintiff's declaration had been proved to be identical with the one read to Kandick, the verdict could not be upheld. There is, upon this point, however, much difficulty. We cannot perceive from the evidence that this is satisfactorily made out; and we think the learned Judge left this open to the jury most favorably to the plaintiff, under the facts in proof; and their finding is quite justified by the evidence. The rule to set aside the verdict must be discharged with costs.

MCDONALD, J.—I tried this cause and I must confess that, had I been the jury, I would have found the other way. I am not so strong upon it, however, as to be warranted in interfering with the verdict. I think there was publication to Kandick.

WEATHERBE, J.—I also would have been better satisfied if the verdict had been the other way; but, I think there is no sufficient reason for disturbing it.

RUMSEY ET AL. v. THE MERCHANTS' MARINE INSURANCE COMPANY.

Before MCDONALD, SMITH, and WEATHERBE, JJ.

(Decided April 9th, 1883.)

Insurable interest.—Unpaid vendor.—Special property retained by vendor.

WHERE insurance was effected on goods on a voyage from Halifax to Labrador and back to Halifax and in the "description of goods insured" the words were, "merchandise under deck, amount \$2000, rate 5 per cent; premium \$100, to return 2 per cent if risk ends 1st October and no loss claimed."


Held, That the risk could not be confined to goods shipped at Halifax.

The insurance was not taken "on behalf of whom it may concern" and it was contended that plaintiffs could not recover being only unpaid vendors, but it appeared that the plaintiffs had supplied the goods to one Tupper under a special agreement by which they were to have a special property in them:

Held, That they had an insurable interest, and that, after verdict for plaintiffs, it was not sufficient cause to set it aside that one of the plaintiffs, on cross-examination, had answered that if the goods had been lost without insurance the loss would have fallen on Tupper, such answer being rather the plaintiff's view of the legal effect of the agreement than a statement of the terms of the agreement as a matter of fact.

This was an action brought to recover insurance on merchandize on board the schooner *Mabel Claire* from Halifax to Labrador and back, on a trading voyage. The schooner sailed for Boone Bay, Newfoundland, and thence to Labrador, visiting nearly all the principal places. At the time of the loss nearly all the goods originally shipped had been traded away and others substituted for them. The contract of insurance was in the following form :

“HALIFAX, *July 13th*, 1878.

“Rumsey, Johnston & Co., have this day effected an insurance to the extent of two thousand dollars, on the under-mentioned property, from Halifax to Labrador and back to Halifax on a trading voyage—time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner *Mabel Claire*, whereof Mouser is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co.  said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof.

J. V. OSWALD,

C. J. WYLDE, *Agent*.

General Manager.

“Description of goods insured ; Merchandize under deck, amount \$2,000, Rate 5 per cent., Premium \$100 to return two (2) per cent. if risk ends 1st October, and no loss claimed ; additional insurance of five thousand (5000) dollars, War-ranted free from capture, seizure and detention, or the consequences of any attempt thereat.”

The loss of the vessel being admitted, the cause was tried before Mr. Justice WEATHERBE, without a jury, who found a verdict for the plaintiffs for the amount of their claim.

A rule *nisi* was taken to set the verdict aside on the following grounds :—

Because Alfred W. Moren has an interest in a portion of the property insured, and he is not added as a plaintiff, nor does the declaration contain any averment of interest in him.

Because the goods shipped at Liverpool and other places, with the exception of Halifax, were not covered by the policy, and the value of the Halifax goods that were lost does not amount to \$1871.93.

Because, under the declaration and policy, the plaintiff can only recover for the loss on that portion of the goods shipped at Halifax in which they were interested.

Because the plaintiffs and William Mouser and Stephen C. Tupper mentioned in said declaration, were not the only persons interested in said goods.

By the terms of the rule the Court was empowered to refer the suit to a master if it should be deemed necessary to take evidence as to the value of the goods shipped at Liverpool and Halifax, and of such portions thereof as were saved respectively, also as to the claim of the defendant company against Alfred W. Moren, and should have power to enter a final judgment in this suit, and to make Alfred W. Moren a plaintiff, or aver interest in him, and adjust the accounts between him and the defendant company, providing the Court should be of opinion that it was necessary to make said Alfred W. Moren a party, or aver interest in him. The rule was argued January 20th, 1882.

Ritchie, Q. C., in support of rule.—The plaintiffs were merely unpaid vendors and had no insurable interest, and cannot recover on the policy, it not being on behalf of whom it may concern. *Pugh v. Wylde*, 2 R. & C., 177; *Outram v. Smith*, 2 R. & C., 187. The insurable interest is in the person having the right of property. *1 Arnould*, 162; *11 Johns.*, 302. The policy did not cover the goods put on board the vessel at Labrador; it was never contemplated by either party that it should. (WEATHERBE, J.—There is no necessity to go outside the policy.) There is evidence of subsequent assurance on the return cargo. In fact they did not intend to insure the return cargo by this policy. In *1 Arnould on Insurance*, 162, it is expressly laid down as settled and notorious law, that a policy beginning the risk "after the loading thereof on board," covers only the goods taken on board at the terminus *a quo*. *1 Arnould*, 356; *2 Taunt.*, 416; *16 East*, 188; *1 Taunt.*, 463; *5 B. & Ad.*, 662, 663; *11 Johns.*, 302; *L. R.*, 7 Q. B., 580; *James*, 195. Plaintiffs cannot recover under the policy on the second count setting out the interest of Bowser, Mouser, and Tupper, because they have not proved interest in those parties, but have proved interest in Moren and others. *Arnould on*

Insurance, 1062; *16 East.*, 141; *5 Taunt.*, 101; *6 Taunt.*, 14; *11 M. & W.*, 10. If the plaintiffs had an interest in the return cargo it would only be to the amount of \$6000. Their interest was only in half, and they would, therefore, only be able to recover half the insurance.

Meagher, Q. C., contra.—The words “merchandize under deck” are merely intended to exclude deck cargo. You must look at the purposes of the voyage. Defendant knew it was a trading voyage, which meant barter, and consequently put in the largest words that could be used. A policy of this description covers return cargo. *12 Wheaton*, 383. The words “back to Halifax” would, as applied to a trading voyage, be meaningless if they did not cover return cargo. Policies are liberally construed. *1 Parsons*, 518. The word “property” is given the widest construction. *2 Metcalf*, 3, 4, and 7. A similar construction should be given to the words “merchandize under deck.” The word “property” in the case cited was held to include “money received for cargo.” If the policy had been merely intended to cover the property then shipped, and capable of description, it would have been so described; but the word “merchandize” here, as the word “property” in the case cited, was intended to cover goods on a trading voyage, which would be likely to change their character. See also *11 Pick.*, 227; *Arnould*, 380; *5 B. & S.*, 407. The words “merchandize under deck from Halifax” would cover goods under deck from Halifax, whether loaded here or not. If the words had been “at and from Halifax,” it might have been different. The words “from Halifax” are descriptive of the voyage, not of the goods. *10 B. & C.*, 858; *3 Camp.*, 272; *1 M. & S.*, 418; *Arnould*, (last edition,) 387, citing *7 El. & Bl.*, 465, and American cases; *Arnould*, (5th edition,) p. 80. The subsequent insurance was to cover goods beyond the amount of the policy in the event of a successful voyage. There is no joint interest here. The interest of Rumsey and Johnston was primary and that of Tupper and Mouser secondary. Rumsey & Johnston made their arrangement with Tupper and Mouser alone, and not with Tupper, Mouser, and Moren. If Moren was not known to Rumsey & Johnston, they did not insure for him, and if not, he cannot

recover. As to the question of interest see *L. R.*, 6 P. C., 224. (WEATHERBE, J.—There is evidence to support the verdict that plaintiffs were the absolute owners of the goods.) *Phillips on Insurance*, sections 91, 370, 386. The fact of the insurance being payable to Rumsey & Johnston was an intimation of interest. Tupper and Mouser's interest was only in the profits. If there were no profits they got nothing. That is a good test to determine the question of agency. *Story on Agency*, section 111. The return cargo was to come to Rumsey & Johnston, who were to dispose of it and reimburse themselves for the goods sent on the outward voyage. Another test is whether, if the goods were all brought back unsold, Rumsey & Johnston would not be obliged to receive them. Our interest was equal to the whole value; *5 El. & Bl.*, 870; *L. R.*, 2 Exch., 139; *Arnould on Insurance*, 53 to 58, 78, 81; *1 B. & P.*, 415. Tupper and Mouser held the goods for us and we were prejudiced by their loss. The case on which *Pugh v. Wylde* was decided was *1 App. Cases*, taken on appeal to the House of Lords, where the Judges were equally divided. *3 Appeal Cases*, 715. The same case influenced the decision in *Outram v. Smith*. Cites *L. R.*, 8 C. P., 596, as to insurable interest. *14 U. C., Q. B.*, 446; *3 Error and Appeal*, (U. C.), 269; *3 B. & Ad.*, 478.

Ritchie, Q. C., in reply.—*Phillips on Insurance*, sec. 380. The present case is peculiar and distinguishable from almost all the cases cited. The case from Wheaton was decided partly on the course of trade. We know nothing about the course of trade to Labrador here. (WEATHERBE, J.—Here the parties have agreed that it is a trading voyage.) We don't know what a trading voyage is here. They might not bring anything back. (WEATHERBE, J.—There was not a word in that case to show that there was a trading voyage, but the Judge said the underwriters were bound to know it. The only ground you can take is that there is no evidence here of what a trading voyage is. There the underwriters were bound by the "notoriety of the fact." Here that is supplied by evidence of the agreement that there was to be a trading voyage, and that goods were to be substituted.) We say the purpose of the voyage was to sell goods. If the underwriters

knew it was to be a trading voyage, there is no evidence that they knew goods were to be substituted. The goods must be loaded at the place where the voyage commences. The words "at and from" make no difference. In the case in *James' Reps.* no place was named. There is no evidence that any goods were exchanged. The interest is only joint with the other owners. The sale was an out and out sale. All that plaintiff could recover in any event is for his own proportionate amount, supposing him to be able to recover at all. The verdict for the whole amount cannot stand. The policy being for themselves alone and not on behalf of whom it may concern, they can only recover for a proportion. In the Privy Council case cited the insurance was on behalf of whom it may concern. (WEATHERBE, J.—What about the goods shipped at Liverpool upon which the policy did not attach?) He undertook to insure all the goods.

WEATHERBE, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

One question to be decided is whether the policy covers any goods except what were shipped and loaded at Halifax. By the extract from the policy printed in the case the insurance is effected "on the under-mentioned property from Halifax to Labrador and back to Halifax on trading voyage; time not to exceed four months, shipped in good order and well conditioned on board the schooner *Mabel Clare*, whereof Mouser is master this present voyage." In the "description of goods insured," underneath, are the words "merchandise under deck, amount \$2000, rate 5 per cent.; premium \$100, to return 2 per cent if risk ends 1st October and no loss claimed; additional insurance of \$5000." This was not much pressed at the argument and rather objected to as a defect in the declaration. There is nothing here to confine the risk to goods shipped at Halifax, and the declaration is sufficient to support the finding for the loss of merchandise under deck at any time within the prescribed period during the trading voyage in question. On that ground, therefore, there is no difficulty in the case. But it is contended that, this policy not having been issued "on behalf of whom it may concern, the plaintiffs cannot recover because they have no insurable

interest, being only unpaid vendors." This branch of the law of Marine Insurance is not free from seemingly conflicting authorities, and difficult questions arise, no doubt, on the subject; but if there is difficulty presented in the case before us it arises from the evidence, and, after a careful examination of all the testimony, we have arrived at a conclusion on that ground which, we think, dispenses with the necessity of settling any difficult legal point. The question arose in *Pugh v. Wylde*, 2 R. & C., 177, relied on by the defendants and was not decided without a dissenting opinion on the Bench, and the decision is not a very satisfactory one. We do not think the case here is the same as *Pugh v. Wylde*, and we do not regard the plaintiffs simply as unpaid vendors. The goods for the trading voyage in question were, as appears by the evidence in this case, supplied under a special agreement, and the plaintiffs bargained for a special property in the goods to be substituted for those shipped at and carried from Liverpool and Halifax, and they were to retain possession of the whole until their claim was first satisfied. The plaintiff, Rumsey, says: "Had arrangements with Stephen C. Tupper to fit him out. A verbal arrangement. We were to supply most of cargo for trading voyage. We took bills of lading of it. The return cargo was to come back to us. We were to dispose of the cargo and pay ourselves, and pay them the balance. It was to be a trading voyage to Newfoundland and back. The whole return cargo was to come back to us * * * * ." "Tupper put in some of the cargo himself. The whole of it, including what Tupper put in, was insured by us and was subject to the arrangements I have spoken of." On the cross-examination this witness says that the master of the vessel was interested with Tupper, who was super-cargo, "in the surplus." Johnson, the other plaintiff, says: "I made arrangements with Tupper. He wanted supplies for trading voyage to Labrador * * * *. He applied to us at Liverpool, N. S., through a friend of his who offered to give a certain amount towards his supplies, and that as security to us he would allow that portion to go as security as a preference that ours should be paid first * * * *. We were to supply them and have a complete control of all the goods until they got back. They were to give no goods on credit, and sooner

than give credit they were to bring goods back and we would credit them with full price; they promised to bring back any goods for which they exchanged them. We were to effect insurance on them to full extent of cargo, and if there was not sufficient to pay everybody when they returned we were to be paid first. They were our goods until they came back."

Crediting this evidence, we think we are not at liberty to say that there is not disclosed an insurable interest by the plaintiffs in the goods lost. A piece of testimony extracted from one of the plaintiffs, but not the one who had negotiated the contract, on cross-examination, is relied on by the underwriters and was urged before us to defeat the claim of the insured. The witness had said that he did not remember the arrangements being put in writing in any way, and then—this is from the minutes—"if the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's." This was evidently elicited to bring the case within the principle which prevailed in *Pugh v. Wylde*, and if it had been as a part of the mutual agreement between Tupper and his colleagues on the one hand, and the plaintiffs on the other, distinctly agreed that, notwithstanding the right of complete control of all the goods throughout the voyage reserved to plaintiffs, the loss of the merchandize on board during the voyage was to fall upon Tupper, that is, that Tupper should be called on to pay for all that plaintiffs shipped at Halifax, a question might have been raised as to whether the underwriters should not be relieved on the ground that plaintiffs were merely unpaid vendors, without an insurable interest; but that question, we say, does not arise. It was competent in cross-examination for defendant's counsel to extract everything from the writings that entered as an element into the special agreement, and it was to be left for the Court to say, whether the loss in question, would have fallen on the one or other of the parties. The answer of the witness was evidently not intended to convey any statement of any communication which took place upon which the special contract in question was based. It is clear to us that it was offered, in reply to a question on cross-examination, as an opinion of the witness as to the legal inference in a certain contingency, upon a point not specially

provided in the agreement on which the trading voyage was undertaken. If a verdict settles anything, it settles always such small matters as that. And we do not think we should send this for another trial to ascertain whether this answer of the witness was intended to convey a statement as to something that as a matter of fact passed between the parties in making the agreement in question.

The rule *nisi* will be discharged with costs.

KEARNEY v. CREELMAN ET AL.

Before McDONALD, SMITH, and WEATHERBE, J J.

(Decided April 9th, 1883.)

Ejectment.—Motion to stay proceedings in action against Officers of the Crown refused.

By Revised Statutes, Chapter 36, section 15, "The financial and general management" of the Nova Scotia Hospital for the Insane is "vested in the Commissioner of Public Works and Mines," and, by section 47 of the same Chapter, the title to the property, and the lands belonging or attached to the same, "is confirmed and vested in the Commissioner of Public Works and Mines, for the time being, and his successors in office, in fee simple, for the purposes and uses of such hospital." An action of ejectment having been brought to recover possession of the premises, a motion was made to set aside the writ and proceedings or for a perpetual stay of proceedings, on the following grounds:—1st. Because such action will not lie against the officers of the Crown or Government, and cannot be maintained against them in respect of such property as that sued for. 2nd. Because such action and proceedings cannot be taken against the Crown and its officers. 3rd. Because the defendants hold the property sued for herein as the officers of the Crown and Government and not otherwise.

The motion was refused.

Semble, That where the act vests the property in the officers of the Crown, ejectment to test the title will lie.

This was an action of ejectment brought by plaintiff, in right of his wife, against the Hon. S. Creelman, Commissioner of Public Works and Mines for the Province of Nova Scotia, and Alexander P. Reid, Medical Superintendent of the Provincial Hospital for the Insane, to recover possession of the lands, property, and buildings known as the Nova Scotia Hospital for the Insane. Service of the writ was accepted by the Attorney-General, who, thereupon, obtained an order *nisi* to set aside the writ and proceedings, or for a perpetual stay of proceedings on the following grounds:—

1st. Because such action will not lie against the officers of the Crown or Government and cannot be maintained against them in respect of such property as that sued for herein.

2nd. Because such action and proceedings cannot be taken against the Crown and its officers.

3rd. Because the defendants hold the property sued for herein as the officers of the Crown and Government, and not otherwise.

The rule came on for argument March 16th, 1882.

Attorney-General in support of rule.—The affidavits sufficiently disclose that the property is that of the Crown. Mr. Creelman holds, by virtue of his appointment by the Lieutenant Governor, and Dr. Reid as Medical Superintendent. The Court cannot entertain such an action as this. The defendants merely hold for Her Majesty, and Her Majesty's right to property cannot be tried in actions against her servants. The pleas in ejectment under the *Practice Act*, section 295, are limited, and are such as the defendants cannot plead. The only remedy of the plaintiff is by petition of right. The property in question is recognized as part of the public property by chapter 36, *Revised Statutes*, "Of Lunatics." Under section 47 the defendant, Creelman, holds the title for the Crown. Where individuals hold as servants of the Crown that does not alter the fact that the proceedings must be against the Crown. Section 15 vests the general management of the property in the Crown. 8 *M. & W.*, 579, was a case much like the present, and goes to show that ejectment cannot be brought against the servants of the Crown. See also 3 *Kerr*, (N. B., Reps.) 487; 2 *Pugs. & Bur.*, 113; *Palmer v. Hutchinson*, L. T., N. S., vol. 45, p. 180.

Wallace, contra.—I admit that where a public officer makes a contract for the Government he is not himself responsible, but it is different where the officer holds property in his possession. In the first case the party in possession was a mere agent, without pretence of right. Here the property is entirely in Mr. Creelman and not in the Queen. The Act says that the property is in him, and the Queen is not mentioned. It is not said he shall hold for the Queen. Even if it did I doubt whether something else would not be required. A plea to the jurisdiction is no good unless it shows where the action is to be brought. The practice is not to set aside the proceedings or stay them, but to transfer them to

the proper tribunal. *Manning's Exch. Practice*, 187; 15 M. & W., 97.

Attorney-General in reply, refers to 15 M. & W., 97, cited above, to show that the remedy is not by suit but by petition of right. Cites, further, section 9 of chapter 14, *Revised Statutes*, which makes provision for the manner in which the property is to be held. The Medical Superintendent is appointed under section 16 of chapter 36, *Revised Statutes*.

On March 31st, 1882, *Wallace* was reheard.—In 6 Dowl. Prac. Cases a petition of right is said to be a matter of right. You cannot bring ejectment against the Crown, but, if a subject is in possession, claiming under the Crown, it may be maintained. I do not think Mr. Creelman can be considered a servant of the Crown in this case. The title has ceased, and he is a mere wrong-doer. The Act gives him no right to hold after the title has expired. *Tobin v. The Queen*, 16 C. B., 356, was the case where an officer acted under the supposed authority of an Act of Parliament. It goes into almost every ground that can be set up here. *Feather v. The Queen*, 6 B. & S., 257, bears upon this case a good deal. The officer used a patent, and it was held the action lay against him personally. 1 *Phillips' Reps.*, 306; 3 B. & Ald., 353; 29 *Beav.*, 300; 13 *Moo. P. C.*, 209; 2 *Exch.*, 167; 9 *Beav.*, 579; *Camp.*, 204 and 165; 1 *Knapp's Appeal Cases*, 139.

Attorney-General in reply.—The Government of Nova Scotia is the Queen, the Lieutenant-Governor, who is her officer to administer the Government, and the Executive, who are his advisers. All the officers appointed by the Lieutenant-Governor are the servants of the Crown. The question to be determined in a trial would be whether Mrs. Kearney or the Queen has title to this property. Cites *Interpretation Act*, chapter 1, *Revised Statutes*, section 18. Section 3 of chapter 9 shows that the Commissioner of Mines, in whom the property is vested, by virtue of office, is the immediate appointee of the Lieutenant-Governor. See also chapter 9, section 14; and sections 15 and 16, chapter 36, *Revised Statutes*. He has no title as trustee, or as having a personal right in himself, but simply as Commissioner. As to effect of appearance in waiving irregularity in process or want of it, *Chitty's Archbold*, 1473, 218.

Mr. Creelman could only appear by attorney. I don't appear for him, but as Attorney-General.

WEATHERBE, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

The principal case relied on by the Attorney-General in his motion to stay this action to recover possession for plaintiff of the premises known as the Hospital for the Insane, on the ground that an action of ejectment will not lie against the Crown and, if so brought, the proceedings may be set aside, was *Legh v. Rowe*, 8 M. & W., 575. The declaration in that case had been served on one Watson and the Board of Ordnance, under whom Watson had been placed in charge of the disputed premises. It was held that the statute did not vest in the Board of Ordnance any of the ancient possessions of the Crown, and the land in question was shewn by affidavit to be a house and land, which, it appeared, had been in possession of the Crown of England from the time of Henry VIII., and was part of the hereditary possessions of the Crown.

In making the rule absolute Lord ABINGER said, "It is quite clear the Court could not issue any process to turn the Crown out of possession, and the only doubt I had was whether the property was not, by the operation of the Act of Parliament, (1 and 2 Geo. IV.), in the possession not of the Crown but of the Board of Ordnance. But on looking more fully into the Act my doubt is entirely removed. It does not apply to any of the ancient possessions of the Crown but only vests in the officers of the Ordnance as a sort of corporation certain manors, messuages, lands, &c., which it recites to have been at various times purchased for the use of the Ordnance for the general defence of the realm." He said the Board of Ordnance was in possession for the Crown and not in that sort of possession contemplated by the act, and, for that reason, the rule was made absolute.

It would seem by this that if the property was held under the act ejectment would lie to test the title, and, for that reason, Mr. Wallace, for plaintiff, it would seem, was justified in claiming, in view of our statutes relating to the lands in this declaration, that the authority was favourable to his contention.

ALDERSON, B., said, "no ejectment could be maintained against the Crown to turn the Crown out of possession by the authority of the Crown itself, but the lessor might proceed by petition of right." And ROLFE, B., pointed out that the remedy in that case was by a petition of right.

I have examined all the other authorities cited, and I think we must refuse the application to stay the proceedings.

MAHON v. GAMMON.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, JJ.

(Decided April 9th, 1883.)

Grounds of defence not demurrable.—Costs not allowed, for irregularity.

Grounds of defence filed and served in the County Court are not subjects of demurrer.

Where the respondent succeeded on appeal, but there appeared to have been some irregularity on his part in the proceedings below, the extent and importance of which were uncertain, costs were not allowed.

This was an appeal from a decision of JAMES W. JOHNSTONE, Esq., County Court Judge for District No. 1. The decision appealed from was as follows:—

"Mr. Tupper, on behalf of the plaintiff, obtained an order authorizing him to demur and reply. Mr. Eaton subsequently obtained an order to set aside that order. I was not aware when the order to demur was granted that the action was summary, or I might have hesitated before allowing it; and now the question to be determined is, are demurrers allowable in summary suits? Section 118 of *Practice Act* provides that no plea shall be required in summary suits, but that the notice of appearance shall contain a brief notice of the grounds of the defence; and section 86, *County Court Act* declares that there shall be no pleading in summary causes, but a brief statement of the grounds of defence shall be filed and served. Pleas, as a matter of fact, do always contain alleged grounds of defence, and the legislature, in declaring that there should be no pleas or pleading in summary suits, intended that the defence should be stated in the most informal and untechnical manner, and these causes have to be

disposed of in the most summary manner, on the merits of the case, independently of all legal forms; and when the Supreme Court had original jurisdiction in this class of cases they were tried on the first day of the Sittings, and the Judge, except in rare cases, gave judgment off-hand. It appears to me clear that the Legislature never intended that these summary cases should be burdened with the delay and expense consequent on the raising and determination of legal issues, else why term them summary and prohibit pleas, which are a statement of grounds of defence in technical form and according to legal phraseology? The grounds of defence are intended to be no more than a notice to the plaintiff, in the simplest manner possible, of the grounds on which his claim is disputed, and I have, in consequence, held the grounds, no matter how many, as but one statement, and in entertaining motions to set them aside as false, etc., have refused to consider them as divisible, as they would, in such case, partake of the nature of pleas; and if I should allow demurrers I should be acting directly contrary to the intention of the Legislature, as well as in violation of the wording of the statute, for section 122, *Practice Act*, expressly says that either party may plead and demur to the same pleadings, and that must refer to what are known as pleas in legal parlance, and cannot embrace grounds of defence in summary suits, because written pleas and pleadings are forbidden in summary suits, and if the Legislature intended pleadings to embrace grounds of defence they would have so stated it, having drawn a wide distinction between pleas and pleading, in the technical sense, and grounds of defence. Section 122, therefore, does not, in my judgment, embrace grounds of defence, and therefore Mr. Eaton's rule to set aside the order to demur and reply must be made absolute."

The learned County Court Judge stated the following case for the opinion of the Court:

1. Are grounds of defence filed and served in the County Courts for this Province in summary actions demurrable?
2. The title of the cause in the writ being Edward Mahon against John Gammon, and the affidavits and order

nisi to set aside the demurrer herein being intituled Edward Mahon against John Gannon, could I make said order absolute in this cause when counsel at the argument of the same objected to the affidavits being read or the motion heard?

3. The order *nisi* was obtained with a stay of proceedings at the beginning of a Sitting of this Court where the cause was entered for trial, and preventing plaintiff from going to trial. Should the order *nisi* have been discharged at the argument for this reason?

Graham, Q, C.—The County Court Judge sets aside grounds of defence as false although the statute allows only “pleadings” to be so set aside. He must, therefore, define “pleadings” in such a way as to include a ground of defence. “Gannon” and “Gammon” are not *idem sonantia*.

Eaton, contra.—The main point is that it was the intention of the Legislature that these cases should be disposed of in a summary way. (*Borden.*—Demurrers may be argued at Chambers.) The Judge has refused to hear them at Chambers. (RIGBY, J.—The act says he can.) The intention was that there should not be any demurrers. The cause is to be disposed of on a statement of grounds of defence. The act says there shall be no pleadings. The grounds of defence are an informal statement of matters of law and fact. (THOMPSON, J.—There can be no demurrer unless there is a statute.) A demurrer is to a plea and the act says there shall be no plea. There is nothing in the distinction between the names.

Borden.—Mr. Eaton could not waive an irregularity in his own affidavit. His affidavit must be entitled in the cause to bring the matter before the Court. Perjury could not be assigned on the affidavit. Gannon is not *idem sonans* with Gammon. To decide that grounds of defence cannot be demurred to would lead to peculiar consequences. You can demur to the writ and why not to grounds of defence?

The rule to set aside the order was given with a stay of proceedings, without notice. The Judge had no right to do this. (THOMPSON, J.—We must assume that notice was given, in the absence of a statement to the contrary.)

THOMPSON, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

We are of opinion that grounds of defence filed and served in the County Courts are not subjects of demurrer. The authority for objections to pleas by way of demurrer refers only "to the *pleadings* of the adverse party," (see sec. 121 of cap. 94, R. S., 4th Series, made applicable to the County Courts), while section 86 of the *County Courts Consolidation Act of 1880*, prescribes that "there shall be no pleadings in a summary cause, but the defendant or his attorney shall, within the time specified in the notice therefor, file with the clerk or deputy clerk of the Court, and serve on the plaintiff, a brief statement of the grounds of his defence," &c. This disposes of the first question submitted for our decision in this cause.

The second question refers to a defect in the affidavit which was used by the defendant's counsel in his application to set aside the demurrers, and the learned Judge of the County Court enquires whether, in view of such irregularity, he was correct in making absolute the rule *nisi* taken on such affidavit. For anything that appears to us the rule might have been made absolute without any such affidavit.

The third and last question enquires whether the rule *nisi* should have been discharged on account of its having been taken with a stay of proceedings. This point we cannot decide without fuller information than the case contains as to the circumstances under which the stay of proceedings was obtained. We are not shewn whether the Judge, in granting the rule *nisi* adjudicated on the matter of a stay of proceedings or not; nor does it appear whether counsel on both sides were heard on the matter, or whether the stay of proceedings was granted improvidently, *ex parte*, without notice, or by concealment, or by misrepresentation.

As we have decided the main question against the appellant we must dismiss the appeal, but we do so without costs, as there appears to have been some irregularity on the part of the respondent's proceedings below, and as the case leaves in a state of uncertainty the extent and importance of that irregularity.

ANDREWS v. LANDERS.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, JJ.

(Decided April 9th, 1883).

Setting aside verdict. — Misdirection. — Burden of proof.

IN an action for an assault, the defendant pleaded *son assault demesne*, and, there being evidence on both sides, the jury found for defendant.

Held, that on appeal from a decision refusing a rule *nisi*, the plaintiff could not rely on an alleged misdirection by the Judge in not instructing the jury that the burthen of proof of the prior assault was on the defendant, in view of the fact that after minute instructions the jury had believed the evidence of the defendant's witnesses, to do which they must have come to the conclusion, not that the evidence was evenly balanced, but that the evidence on the part of the defendant preponderates.

Per THOMPSON J., Where there is testimony on both sides of a case the decision is to be governed by the weight of evidence, and not by the legal doctrine about burden of proof.

There can be no appeal on a ground not taken below.

Quære, Whether juries, in cases in the County Courts, other than those mentioned in section 55 of the Act, should be instructed to give general verdicts, and whether the proper procedure is not to obtain their findings on the controverted facts which the Judge deems it proper to submit to them, after which the judgment in the cause should be given by the Judge irrespective of the jury.

Appeal from a judgment of SAVARY, County Court Judge, refusing to make absolute a rule for a new trial.

The action was for assault and battery, to which defendant pleaded that plaintiff first assaulted the defendant, who necessarily committed the alleged assault in his own defence. The cause was tried before SAVARY, County Court Judge, and a jury of five, who brought in a verdict four out of five for defendant. The rule was taken on the following among other grounds:

4. Because of the mis-direction of the learned judge.

5. Because two of the jurors who were sworn of the jury, and gave the verdict herein, were not qualified to serve as jurors, and had not been assessed for property in a sufficient amount and lacked the proper qualification to serve as jurors.

The following is a memorandum of the judgment appealed from:—

"Counsel having moved for a new trial on the grounds stated in their rule *nisi*, I refused it, intimating that the ground taken in respect of my not instructing the jury that the burthen of proof in respect to the prior assault lay on the

defendant, was fairly open to argument, but that I thought that while the non-qualification in respect to property, &c., was a ground of objection before trial, it was not a ground for new trial, as disqualification by kinship or interest subsequently discovered undoubtedly was. But I granted the rule on all the grounds on filing security in \$160."

Graham, Q. C., in support of appeal.—There are two points in the case. 1st. Two of the jurors were disqualified and the disqualification was not discovered until after verdict. 2nd. The defence being that the plaintiff struck the first blow, the burden of proof was on the defendant and the judge should have so instructed the jury. (RIGBY, J.—It is a question whether you can take the ground of mis-direction under your rule.) The evidence being so nicely balanced it is a question whether the party was not entitled to have the cause tried by a properly qualified jury. (RIGBY, J.—Is there any dispute as to the disqualification?) No. (RIGBY, J.—Have you authority to shew that you can take that ground after verdict?) Yes. (McDONALD, C. J.—I don't think it possible to disturb the verdict on the weight of evidence.) It is admitted that plaintiff was injured and the onus is on defendant to show that plaintiff struck first. (RIGBY, J.—There is a common impression that if a man strikes you with the tips of his fingers you are at liberty to strike back as hard as you please. The judge's charge might give the jury the impression that that was the kind of question they had to consider.) On the point of disqualification of jurors cites *Cowling v. LeCain*, 1 Old., 717; *Lynds v. Hoar*, 1 R. & C., 327. A motion may be made to set aside the verdict on account of any matter which would have been ground of challenge, provided it was not known before verdict. Here two of the jury were not assessed. (WEATHERBE, J.—You ask us to set aside the verdict on the ground of misdirection. Three of us have decided that that ground is not sufficient. McDONALD, C. J.—I think that was merely a conversation rather than a binding decision. I understand the question here to be whether the grounds taken below were sufficient to entitle the party to a new trial according to the rules of the Court below.) Yes. (WEATHERBE, J.—I should think

that in misdirection above all things you should set out what it was. RIGBY, J.—I think it important for another reason that the judge might refuse an appeal on the ground taken and the question might come up here whether the point was taken below. WEATHERBE, J.—For two years counsel never pretended to raise any point unless it was specially set out. THOMPSON, J.—I raised the point and argued it but could get no decision. WEATHERBE, J.—In the case argued by Mr. Wade the other day I understood that my brother THOMPSON thought the ground was sufficient and that Mr. Wade argued the case to convince the rest of us that the justice of the case required an amendment.)

Sedgewick, Q. C., contra.—The only case in which the County Court Judge can grant a rule *nisi* returnable before himself is where he is dissatisfied with the finding of the jury. (WEATHERBE, J.—If he has no power to grant a new trial, why does not that end it?) It does end it. *Acts 1880*, chap. 2. (RIGBY, J.—What would he do if there was a real disqualification?) I think the case would have to be brought up by certiorari. (RIGBY, J.—Would not the practice of the Supreme Court apply?) It applies only where it is consistent with this act. Here it would be inconsistent. If there was misdirection, etc., the proper remedy is by appeal. The judge might set aside the verdict because of the improper jury, but on all other points the proper remedy was to appeal. His order refusing a new trial might be appealed from but only on the one ground of the improper jury. It does not appear that the judge was dissatisfied with the finding of the jury, and the only question which can now be argued is respecting the qualification of the jury. As to the misdirection the plaintiff has chosen his tribunal under section 57. Section 99, providing for specification of objections, requires by its grammatical construction that those objections shall be pointed out. (THOMPSON, J.—If only one question of law arises under the charge, the ground of misdirection is sufficiently specific.) There is no appeal before the Court as appears from the record, because the order appealed from is not taken within the eight days. The order appealed from is dated March 15th, 1882; the rule for appeal March 31st, 1882.

Harrington, Q. C., with *Sedgewick, Q. C.*—The assessment is made previous to the assessment roll, and if a man's name is left off the roll by accident he cannot be deprived of the right of sitting on the jury. (THOMPSON, J.—I think that in the County Court where juries are summoned the words in reference to who shall sit as jurors, are, "qualified or eligible." RIGBY, J.—Had not plaintiff's counsel the means of knowledge, and was he not satisfied with the jury until he knew the verdict was against him? WEATHERBE, J.—Before you can take advantage of such an objection you should make enquiry. RIGBY, J.—At all events you should show that you had not the means of knowledge.) Cites *Tidd's Prac.*, 852, 853. Both the jurors have the requisite qualification and there is no evidence that they were not properly assessed. The Court has a discretion,—*LeBlanc v. McRae*, 2 R. & C.,—and it should not be exercised in the plaintiff's favor under the circumstances. The jury were summoned to determine a question of fact and the judge was justified in leaving it to them as he did.

Graham, Q. C., in reply, cites *County Court Act*, sections 56, 57, 99. Our appeal comes within the last section, as we are dissatisfied with the judge's decision on the motion for new trial. Cites section 100. This section does not require a specific statement of grounds. Where grounds were required to be shortly stated it was held sufficient to take the ground "against law and evidence." *Harrison's Com. Law Proc. Act*, 336; *Wallace v. Souther*, 2 Sup. Court R., 607.

RIGBY, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

This cause having been tried before the Judge of the County Court, at Annapolis, with a jury and a verdict rendered for defendant, a rule *nisi* was taken out to set it aside, on several grounds. After argument of this rule, the learned Judge of the County Court gave judgment refusing to make the rule absolute, and from that judgment this appeal was taken by defendant.

The cause of action was assault and battery, and the defence relied upon "*son assault demesne.*"

The only grounds of appeal sought to be maintained at the argument were the fourth and fifth in the order for appeal: "Because of the misdirection of the learned judge," and, "Because two of the jurors who were sworn of the jury and gave the verdict herein, were not qualified to serve as jurors, and had not been qualified to serve as jurors, and had not been assessed for property in a sufficient amount, and lacked the property qualification to serve as jurors."

Assuming that the former of these grounds is not inapplicable to an appeal from a decision refusing to make absolute a rule *nisi* to set aside a verdict, and sufficiently specific, it appears from the memo. of his judgment, that the only ground of misdirection on which the judge below gave a decision, and which, it is to be assumed, was the only one taken, was in not instructing the jury that the burthen of proof as to the prior assault was on defendant. I do not think this contention can be upheld, in view of the fact that, after the minute instructions of the judge, the jury saw fit to believe the evidence of defendant's witnesses on the issues submitted to them, to do which, I assume, they must finally have come to the conclusion, not that the evidence on each side was evenly balanced, but that that on the part of the defendant preponderated.

It was also suggested at the argument that the jury were in effect instructed that, as they should find who struck the first blow, their verdict should be for plaintiff or defendant, and that, as it did not follow as a conclusion of law that an assault could be justified merely by proof of the person committing it having been first assaulted by the other, there was misdirection on that point. But it does not appear that this ground was taken below, and therefore there is no decision on it from which to appeal. Possibly that controverted fact was the only one on which the judge required the assistance of the jury, and that he himself had decided the other facts necessary to determine the case in accordance with his instruction.

It is a question, however, worthy of consideration whether juries in cases in the County Courts, other than those mentioned in section 55 of the Act, should be instructed

to give a general verdict in the cause, and whether the proper procedure is not to obtain their findings on the controverted facts which the judge deems it proper to submit to them, after which the judgment in the cause should be given by the judge irrespective of the jury.

We do not think the plaintiff's affidavits are sufficient to entitle him to have the verdict set aside on the ground of the disqualification of the jurymen. They omit to shew that the assessment rolls could not have been examined and the disqualification discovered on the day the jury were sworn and when, as Mr. Mills admits, he saw the return, or at any other time before verdict. In the language of Lord ABINGER, in *Pryme v. Titchmarsh*, 10 M. & W., 607, "He was bound to make enquiry if he meant to take advantage of such objection," and of PARKE, B.: "It would be altogether unjust to allow him to lie by and take the chance of a verdict, and then come and set aside the proceedings on an objection such as this, with respect to which he had the means of knowledge."

The appeal must be dismissed with costs.

THOMPSON, J.—The learned Judge below was not asked, on the argument for a new trial which took place before him, to grant a new trial on the ground that there was a general verdict for defendant instead of a finding on certain facts or issues submitted to the jury, nor on the ground that the final decision should have depended on whether the assault made by the defendant was necessary for his own defence. If he had been it seems to me the plaintiff must have succeeded, but as he was not so asked there could be no appeal on these grounds. The non-direction relied on at the argument of the appeal, in reference to the burden of proof, does not seem to me to have been a sufficient ground for a new trial, in view of the law relating to non-direction, because, where there is testimony on both sides of a case the decision is to be governed by the weight of evidence, and not by the legal doctrine about burden of proof. As to the difference between the two rules see *1 Greenleaf*, (11th. ed.,) p. 103, n., and the cases there cited, *2 Gray*, 132; *11 Cush.*, 345; *8 Cush.*, 605. I concur in the judgment delivered by my brother RIGBY.

WEATHERBE, J.—I have read over the judgment of my brother RIGBY, and have come to the same conclusion upon the grounds there set out.

PULLEN v. SANFORD.

Before McDONALD, SMITH and WEATHERBE, JJ.

(Decided April 9th, 1883.)

Action in promissory note.—Presentation for payment.—Agency of Bank holding note for collection.

Two promissory notes made payable at the Bank of Nova Scotia were placed in the hands of the agent of the Bank at Kentville for collection. The agent testified that the notes in question "were in the head office at Halifax when they became due, and after they became due were returned to me." There was no evidence that the defendant or any one representing him was at the place where the notes were made payable to meet his engagement.

Held, That the Bank, under the evidence, was the agent of the payee to receive payment and not of the maker to pay. The judgment for plaintiff below was confirmed and the rule discharged with costs.

This was an action to recover the amount of two promissory notes for four hundred and one hundred dollars, respectively, made by the defendant, payable, the first in thirty-six months, and the second in thirty-nine months after date, to the order of the plaintiff, at the Bank of Nova Scotia, Halifax.

Defendant pleaded non-presentment, and also pleaded a set-off.

The only evidence in reference to presentation was given by the agent of the Bank of Nova Scotia at Kentville, with whom the notes had been left for collection, who said:—"These notes were in my hands for collection, placed there by plaintiff before they were due; they were not paid when they became due; they were in the head office at Halifax when they became due, and after they became due were returned to me." He further said that he saw defendant after the notes became due, and shewed him a telegram which he had received, purporting to be signed by defendant, asking him to re-call the note, (the first note,) without presentation; that defendant did not deny the telegram, and said he was much obliged to him for re-calling the note.

The cause was tried before WEATHERBE, J., without a jury, who found a verdict for plaintiff, to set aside which a rule was taken.

G. Ritchie, in support of rule.—The only point is want of presentation. The note was payable at a bank on a particular date. The evidence shews that it was sent to the bank previous to the date on which it was payable, and received back after that date, but there is no evidence that the formality of presentation was gone through, or that the note was in the bank at the date in question. (WEATHERBE, J.—That is for a jury. I found it was in the bank at the date. There was evidence on the point, and nothing the other way.) There is no proof that the bank held the note as owner, or that there were no funds in the bank to meet it. These facts must be proved to dispense with the formality of presentation. *14 M. & W.*, 44; *8 Wallace*, 641.

Borden, contra.—The question is whether there is not *prima facie* evidence of presentation. Mr. Chipman states positively that the notes were in the head office when they became due, and, for anything that appears, he may have been there himself. (MCDONALD, J.—It is not necessary.) *3 Metcalf*, 497; *1 Daniel on Negotiable Instruments*, 503; *Story on Promissory Notes*, section 243; *7 Wend.*, 160; *18 Pick.*, 63; *13 Pick.*, 472.

Ritchie, Q. C., in reply.—The rule is that every note payable at a certain place must be presented to the person who is to pay it, or some reason shewn to excuse the want of presentment. The same rule applies to a note payable at a bank. It is not enough to shew that the note was in the bank. It must be further shewn that there were no funds. If there were funds in the bank to meet the note, proof that the note was there would not be sufficient.

MCDONALD, J., (April 9th, 1883,) delivered the judgment of the Court:—

The notes in question are made payable at the Bank of Nova Scotia, and were placed in the hands of Mr. Chipman, who is the agent of the bank at Kentville, for collection, before they were due. He testifies that "they were in the

head office at Halifax when they became due, and after they became due were returned to me." It cannot be doubted that the note upon which this case turns—the \$100 note—was, at the time of its maturity, in the bank at Halifax for collection, and, under the evidence, the bank was the agent of the payee to receive payment, and not the agent of the maker to pay the amount. There is no evidence that the defendant or any one representing him, was there to meet his engagement and pay the amount of the note at the place indicated.

I think the judgment of the learned Judge who tried the cause ought to be confirmed, and that the rule *nisi* should be discharged with costs.

DICKIE v. MERCHANTS' MARINE INSURANCE COMPANY.

Before McDONALD, C. J., and SMITH, and JAMES, J J.

(Decided April 9th, 1888.)

Marine insurance.—Broker agent of plaintiff.—Misrepresentation of voyage.—Notice of abandonment necessary although suit is for not issuing policy.

PLAINTIFF applied to one Haley, who acted as a broker for the Shipowners' Association of Windsor, and also for the defendant company doing business at Halifax, for insurance on one-fourth interest in a vessel on a voyage from Cochin to New York via Colombo and Alipee. The broker replied that the "Shipowners' Marine" did not care for the risk, but he thought he could place her. Plaintiff wrote him, saying in substance:—"You may place insurance on *Charlie* at your figures. I think it should be done for three per cent, but do the best you can. Let me know as soon as possible." The broker then applied to the defendant company for insurance on plaintiff's vessel "*Cochin, Alipees and New York*," but the vessel sailed and was lost on a voyage from Cochin via Colombo and Alipee to New York.

Held, That the broker was the plaintiff's agent, and inasmuch as the insurance he applied for was on a different voyage from that on which the vessel sailed and was lost, the plaintiff must fail.

Held further, that notice of abandonment was necessary, although the suit was brought, not on the policy of insurance, but for not issuing a policy.

This was an action on a contract for insurance upon plaintiff's one-fourth of the barque *Charlie*, for her voyage from Cochin to New York via Colombo and Alipee. On May 21st, 1879, plaintiff wrote Dr. Haley, the broker of an association of underwriters known as the Shipowners' Association, at Windsor, as follows:—"What rate can you

insure say \$3,000 on $\frac{1}{4}$ barque *Charlie*, valued at \$8,000, for the voyage from Cochin to New York via Colombo and Allipee, vessel at Cochin, chartered April 10th; an early reply will much oblige."

On May 24th Dr. Haley replied declining the risk for the Shipowners' Association, but adding:—"I think I could place her for you at 3 per cent. or $3\frac{1}{2}$ per cent." On the 26th, plaintiff wrote authorizing Dr. Haley to place the insurance accordingly, \$3,000 at 3 to $3\frac{1}{2}$ per cent. Plaintiff's application, omitting the word "Colombo," was thereupon forwarded to the defendant company, of which Dr. Haley, was sub-agent, who agreed to accept the risk "for voyage described" and, through their agent, on June 3rd, informed the plaintiff that on receipt of certain information asked for in reference to another risk, the policies would be forwarded. Defendants subsequently refused to deliver the policy on the *Charlie*, on the ground that at the time of the making of the agreement for insurance plaintiff concealed from the company the fact of the loss of the vessel, which they alleged to have been then known to him and unknown to the company. It was admitted that news of the loss was published in *Lloyd's List* on the 20th May, 1879, as follows:—

COLOMBO, *May 19th, 1.20 p. m.*

Charlie, British barque, bound hence for Alipee, struck the ground northwardly of Cormorin, and has put back leaky; cargo damaged, but to what extent not yet ascertained.

It was also admitted that plaintiff's interest in the vessel was subject to a mortgage for \$8,000.

On the return of the vessel to Colombo several surveys were held to ascertain her condition, and, there being no means of repairing her at that port, she was, on the recommendation of the surveyors, stripped and sold at public auction. No notice of abandonment was given.

The cause was tried before McDONALD, J., at Halifax, who found a verdict for plaintiff for \$2,895. A rule was taken to set the verdict aside, and for a new trial, which came on for argument January 18th, 1883. The pleadings and evidence are fully set forth in the judgment at p. 249.

Ritchie, Q. C., in support of rule.—There is no evidence of loss. The proofs of loss are not in evidence, or, if so, were wrongly admitted. There is no evidence of total loss, or of surveys or repairs. The captain says he tried to get money to repair. This is inconsistent with his statement that she could not be repaired. There was no notice of abandonment. If the captain could not get money to repair he should have given the defendants an opportunity to repair. *Kolpinbach v. McKenzie*; *L. R.*, 3 C. P. Div., 477. At Trincomalee, on the Island, there is a naval dockyard. There is no pretence that the vessel could not have been patched enough to have enabled her to be taken around there. There is no evidence of any consideration having been given for the insurance. The damages are too remote. The only breach in the first and third counts is refusal to give a policy. The loss of the vessel is not a consequence of the refusal to give a policy. Insurance might have been effected elsewhere; *L. R.*, 1 Ex., 177; *L. R.*, 1 C. P., 506. The loss took place before the contract was completed. The letter of the 6th June, giving the valuation of the vessel, which was essential to the completion of the contract, was written by plaintiff after he knew of the loss; *10 Pick.*, 326; *3 C. & P.*, 267; *3 T. R.*, 148; *3 Cush.*, 224; *4 Wheat.*, 225. Unless Haley was agent of the company the vessel was never insured; Haley was wholly the agent of Dickie, and the vessel never went on the voyage for which he insured. Plaintiff, having employed Haley as his agent, cannot say he is agent of the company; *2 Parsons*, 423; *Evans on Principal and Agent*, 5; *1 Arnould*, 161; *5 Bing.*, 503; *2 Duer.*, 202, 203; *2 American Reps.*, 577. Plaintiff did not treat Haley as agent of the defendants, but wrote him that he held him on the policy. The first reference to the defendants was in a letter of Haley of January 5th, 1880, six months after the loss. This letter shows that the contract was not complete. Dickie, in his reply of January 13th, 1880, refuses to recognize the defendants and insists on looking to Haley. Haley, in his reply of January 15th, 1880, refers the plaintiff again to the defendants. It is clear that plaintiff never thought of looking to defendants down to that time. The verdict is excessive and cannot be

sustained under the evidence. The insurance was \$3,000 and the verdict was \$2,895.

Graham, Q. C., contra.—There is a justifiable sale by the master which dispenses with notice of abandonment. This is an action for damages for not delivering a policy, and notice of abandonment is not required. 3 C. P. D., 471, (*Brett, L. J.*) If the policy had been given we might have been required to comply with the usual condition. (McDONALD, C. J.—If the captain was justified, by necessity, in selling, you are entitled to recover without notice. He should have communicated with his owners.) He did so three days after his arrival. On the 17th May the vessel struck, on the 19th May she arrived, on the 20th the master went ashore, and on the 23rd he telegraphed to his owners. The evidence of the master shows that he did the best he could for all concerned, and could not do anything but what he did. 2 *Arnould on Marine Insurance*, (4th ed.,) pp. 886, 932; *Barker v. Jansen*, L. R., 3 C. P., 305, (WILLES, J.;) *Lowndes on Marine Insurance*, sec. 224. The keel was knocked off amidships and some of the garboard streaks on both sides; the ship was hogged amidships and the ceiling bulged up. She could not be repaired nearer than Singapore or Bombay, and was not sufficiently seaworthy to sail to either of those ports. The case of *Knight v. Faith* is virtually overruled by *Rankin v. Potter*, 6 E. & I. App., 130. (McDONALD, C. J.—I have no hesitation in believing that the captain acted *bona fide*, and if it were not for the difficulty caused in my mind by *Knight v. Faith*, I would have no doubt.) *Robertson v. Clarke*, 1 Bing., 445; 2 *Starkie*, 557. It is not a defence to an action on a policy of insurance that no premium is paid. An action can be brought on an agreement for a policy without payment of premium. The damages would be the amount the party would be entitled to recover if he had a policy. The case of *Robinson v. Dudman*, 1 R. & C., 50, was an action against a company for refusing to furnish a policy. The cases of *Canada Insurance Company v. Western Assurance Company*, 26 Grant, 254; 5 *Ontario Appeals*, 244, both show that this was a contract of insurance. *Taylor v. Merchants' Fire Ins. Co.*, 9 Howard, 390; *Kent v. Anchor*, 9 Howard, 390; *Rossiter v.*

Trafalgar Ins. Co., 27 Beav., 377; *May on Insurance*, p. 16. As to oral contracts of insurance and authority of agent, see *Kelly v. Commonwealth Ins. Co.*, 641; 4 *Bennett*, 766; 5 *Bennett*, 707; 13 *Allen*, 320; 16 *Gray*, 443; 17 *U. C.*, *C. P.*, 55; 18 *U. C.*, *Q. B.*, 438; *Adams v. Lindsell*, 1 B. & A., 681. The mistake in the policy was that of the agent. The valuation was given to the agent in the first letter. The agent mislaid the letter. The valuation was \$8,000. Dickie had then done all on his part and for the mistakes of the agent the company are liable and not Dickie. Haley was held out by defendants as their agent. *Wood v. Dwarrris*, 11 *Exch.*, 493; *Insurance Company v. Wilkinson*, 13 *Wallace*, 222; *Bodine v. Exchange Fire Ins. Co.*, 10 *Am. Reps.*, 566; 51 *N. Y.*, 117; *Miller v. Phoenix Ins. Co.*, 1 *Ib.*, 262. In reference to mistake, see *Bates' Digest*, p. 49. 27 *Iowa*, 203. As to payment of premium see *Anderton v. Excelsior Insurance Company*, 4 *Bennett*, 697; 27 *N. Y.*, 216, (DENIO, E. J.); *Walker v. Metropolitan*, 5 *Bennett*, 207; 156 *Maine*, 371; *Baxter v. Massasoit Ins. Co.*, 13 *Allen*, 320; *Sanborn v. Fireman's Ins. Co.*, 16 *Gray*, 448.

Ritchie, Q. C., in reply.—The Court should take notice of the existence of a dockyard at Trincomalee. There is no evidence that the vessel could not be temporarily repaired. The inference is that she could, as the captain tried to raise money. The application in the first instance was not for insurance in the defendants' office, but in another office in which he had been in the habit of insuring. That failing, Haley was agent of plaintiff to insure in any company he liked. The voyage which Haley applied for a policy on was not the voyage the vessel sailed on. 2 *Curtis' Circuit Cases*, 277, 291; 1 *Parsons on Marine Ins.*, 117. If the plaintiff could not recover under the policy, if he had it, he has sustained no damage.

MCDONALD, C. J., now, (April 9th, 1883,) delivered judgment as follows:—

This is an action against the defendant company on an alleged agreement to insure the barque *Charlie* on a voyage from Cochin to New York via Colombo and Alipee, and was

tried before my brother McDONALD, at Halifax, in November, 1880.

The pleadings in the printed case are as follows :—

We command you to summon the Merchants' Marine Insurance Company of Canada, a body corporate doing business in the Province of Nova Scotia, the defendant herein, to appear in the Supreme Court, at Halifax, within ten days after the service of this writ, at the suit of David M, Dickie, the plaintiff herein, who says that the said defendant company, engaged in carrying on the business of marine insurance in the Province of Nova Scotia by means of agents, in consideration of a certain premium to be paid by the plaintiff to the said agents, undertook, promised and agreed to insure and cause to be insured to said plaintiff in the sum of three thousand dollars upon the plaintiff's one-fourth of the vessel or barque called the *Charlie*, for her voyage from Cochin to New York *via* Colombo and Alipee, which the said vessel or barque had sometime before commenced, and to execute, hand over and deliver to the plaintiff within a reasonable time thereafter a good and sufficient policy of insurance therefor, embracing and in accordance with such agreement and contract, and in the form and in the terms thereof; and the plaintiff says that the defendant company, in violation of said contract and agreement, and in breach thereof, did not execute, deliver and hand over to the plaintiff any such policy of insurance, but neglected and refused so to do, and the said vessel was wholly lost during the said voyage, and while the plaintiff was interested therein to the extent aforesaid, and the plaintiff has been deprived of his insurance on his said one-fourth of the said vessel, and has been put to great delay and expense in the enforcement of his right, and has otherwise suffered great wrong, loss and damage.

And the plaintiff also says that the said defendant company, engaged in carrying on the business of marine insurance in the Province of Nova Scotia by means of agents, in consideration of a certain premium to be paid by the plaintiff to the said agents, undertook, promised and agreed to insure and cause to be insured the said plaintiff in the sum of three thousand dollars upon the plaintiff's one-fourth of the vessel

or barque called the *Charlie*, for the voyage from Cochin to New York *via* Colombo and Alipee, which the said vessel or barque had sometime before commenced, and the said vessel was wholly lost during the said voyage, and while the plaintiff was interested therein as aforesaid, and all things have happened and all times have elapsed, and all conditions have been performed necessary to entitle the plaintiff to have the said sum of three thousand dollars paid to him, yet the defendant company has not paid the same.

And the plaintiff also says that the said defendant company, engaged in carrying on the business of marine insurance in the Province of Nova Scotia by means of agents, in consideration of a certain premium to be paid by the plaintiff to the said agents, undertook, promised and agreed to insure and cause to be insured the said plaintiff in the sum of three thousand dollars upon the plaintiff's one-fourth of the vessel or barque called the *Charlie*, lost or not lost, for her voyage from Cochin to New York *via* Colombo and Alipee, which the said vessel or barque had sometime before commenced, and to execute, deliver and hand over to the plaintiff within a reasonable time thereafter a good and sufficient policy of insurance therefor, embracing and in accordance with such agreement and contract and in the form and on the terms thereof, and the plaintiff says that the defendant company, in violation of said contract and agreement and in breach thereof, did not execute, deliver or hand over to the plaintiff any such policy of insurance, but neglected and refused so to do, and the said vessel was wholly lost during the said voyage, and while the plaintiff was interested therein to the extent aforesaid, and the plaintiff has been deprived of his insurance on his said one-fourth of the said vessel, and has been put to great delay and expense in the enforcement of his right, and has otherwise suffered great wrong, loss and damage.

And the plaintiff also says that the said defendant company, engaged in carrying on the business of marine insurance in the Province of Nova Scotia by means of agents, in consideration of a certain premium to be paid by the plaintiff to the said agents, undertook, promised and agreed to insure and cause to be insured the said plaintiff in the sum

of three thousand dollars upon the plaintiff's one-fourth of the vessel or barque called the *Charlie*, lost or not lost, for her voyage from Cochin to New York *via* Colombo and Alipee, which the said vessel or barque had sometime before commenced, and the said vessel was wholly lost during the said voyage, and while the plaintiff was interested therein as aforesaid, and all times have elapsed, and all conditions have been performed necessary to entitle the plaintiff to have the said sum of three thousand dollars paid him, yet the defendant company has not paid the same.

And the plaintiff says that the defendant company is indebted to him for interest upon money of the plaintiff held by the defendant company and foreborne to them by the plaintiff for a long time now elapsed.

And he claims three thousand five hundred dollars.

Dated the 19th day of August, A. D. 1880.

The following are the particulars of the plaintiff's claim :

To amount of insurance on one-fourth of barque

Charlie..... \$3,000.00

To interest on same..... 180.00

PLEAS.

1. The defendant company herein, by Joseph Norman Ritchie, their attorney, for a first plea to the first, second, third and fourth counts of the plaintiff's declaration, say that they were not engaged in carrying on the business of marine insurance in the Province of Nova Scotia by means of agents.

2. And for a second plea to the said first, second, third and fourth counts, the said defendant company say that they never undertook and promised as alleged.

3. And for a third plea to the first and third counts of the plaintiff's declaration, the said defendant company say that they did not neglect and refuse to execute and deliver said policy to the plaintiff.

4. And for a fourth plea to the first, second, third and fourth counts of the plaintiff's declaration, the said defendant company say that it was a condition precedent to the effecting of said insurance and the issue of said policy that the premium or consideration therefor should be paid or secured to the said defendant company, which was never done, and said alleged

agreement for insurance was never completed or became binding on defendant company.

5. And for a fifth plea to the said first, second, third and fourth counts of the plaintiff's declaration, the said defendant company say that the plaintiff was not interested in said ship and premises as alleged.

6. And for a sixth plea to the said first, second, third and fourth counts of the plaintiff's declaration, the said defendant company say that the said ship was not lost by the perils insured against, or agreed to be insured against, or any of them, as alleged.

7. And for a seventh plea to the said first, second, third and fourth counts of the plaintiff's declaration, the said defendant company say that the said ship, at the commencement of the voyage, was not seaworthy for the said voyage.

8. And for an eighth plea to the said first, second, third and fourth counts of the plaintiff's declaration, the said defendant company say that they were induced to make said agreement by the fraud of the plaintiff.

9. And for a ninth plea to the plaintiff's declaration, the defendant company say that at the time of the making of said agreement the plaintiff and his agents wrongfully concealed from the said defendant company a fact then known to the plaintiff and his agents, unknown to the defendant company, and material to the risk of the said agreement, that is to say, that the said ship was then lost, or had sustained serious damage.

10. And for a tenth plea to plaintiff's declaration, the defendant company say that at the time of the making of the said agreement the plaintiff and his agents wrongfully concealed from the defendant company a fact then known to the plaintiff and his agents, and unknown to the defendant company, and material to the risk of the said agreement, that is to say, that notice of the loss of said ship or the damage she had sustained on said voyage had been published in one or more public newspapers two or three days previously.

11. And for an eleventh plea to the plaintiffs' declaration, the said defendant company say that at the time of making said agreement the plaintiff and his agents wrongfully concealed from the defendant company a fact then known to

the plaintiff and his agents and unknown to the defendant company, and material to the risk of the said agreement, that is to say, that the said ship had been previously reported as lost or seriously injured on said voyage.

12. And for a twelfth plea to the plaintiff's declaration, the said defendant company say that the alleged agreement, if any, entered into between the plaintiff and the defendant company, was to insure the plaintiff in the sum of three thousand dollars on the barque *Charlie* from Cochin to New York *via* Alipee, and to deliver to the plaintiff a policy therefor, but that after the commencement of the risk in said policy mentioned and before the said loss, the said ship, without sufficient cause or excuse, did not proceed on said voyage, and deviated therefrom.

13. And for a thirteenth plea to the plaintiff's declaration aforesaid, the said defendant company say that the alleged agreement, if any, entered into between the defendant company and the plaintiff, was that the defendant company was to insure the plaintiff in the sum of three thousand dollars on the barque *Charlie*, from Cochin to New York *via* Alipee, and to deliver to the plaintiff a policy therefor, which said policy was to have inserted therein the following clause :— "That all claim in said policy should be void unless prosecuted within one year from the date of loss." And the defendant company say that said action was not commenced until after the expiration of one year from the date of the alleged loss.

14. And for a fourteenth plea to the fifth count of the plaintiff's declaration, the said defendant company say that they were never indebted, as alleged.

The said defendant company, by J. N. Ritchie, its attorney, for a first added plea by consent, as to plaintiff's declaration, say : "That the alleged agreement, if any, entered into between the defendant company and the plaintiff was that the defendant company was to insure the plaintiff in the sum of three thousand dollars on the barque *Charlie*, from Cochin to New York *via* Alipee, and to deliver to the plaintiff a policy therefor, which said policy was to have inserted therein the following clause :—"That if the said assured should have made any other insurance upon the premises prior in date to said policy, the defendant company should be answer-

able only for so much as the amount of such prior insurance might be deficient towards fully covering the premises assured." And defendant company say that the assured did make other assurance upon the premises prior in date to said policy to an amount sufficient to fully cover the premises assured.

And for a second added plea to plaintiff's declaration, said defendant company say that the said plaintiff effected other insurance on the said vessel and premises, and before the commencement of this suit received from other insurers the full value of said property insured under said policy, and has been fully indemnified for all loss or damage he may have sustained in consequence of the alleged loss.

The facts in proof are substantially that the defendant company, incorporated by Act of Parliament, with its head office at Montreal, was and is doing business in Nova Scotia by its duly-appointed agent, Mr. Charles J. Wylde, of Halifax. Mr. Allen Haley, of Windsor, N. S., was appointed by Mr. Wylde his sub-agent at Windsor, with authority to receive applications for risks, and collect premiums on insurances accepted,—Mr. Wylde reserving to himself in all cases a veto on applications submitted. Mr. Haley was at the time of his appointment, and when the proposal of the plaintiff for re-insurance was made, the broker of an association of underwriters at Windsor known as the Shipowners' Association. On the 21st May, 1877, the plaintiff addressed the following letter to Mr. Haley :—

CANNING, May 21st, 1879.

DR. HALEY :

What rate can you insure say \$3,000 on $\frac{1}{4}$ barque *Charlie*, valued at \$8,000, for the voyage from Cochin to New York via Colombo and Allipee, vessel at Cochin, chartered April 10th. An early reply will much oblige,

Yours truly,

D. M. DICKIE.

Haley replied as follows :—

WINDSOR, May 24th, 1879.

"Shipowners'" Marine do not care for *Charlie* for India voyage; had declined her previously for others. I think I could place her for you at 3 per cent. or $3\frac{1}{2}$ per cent.

Yours, ALLAN HALEY.

D. M. Dickie, Esq., Canning.

It would appear from these communications that the plaintiff's application was, or was assumed by Haley to be, for insurance in the "Shipowners'" Association, of which, as stated, Haley was the broker and agent. In reply to Haley's refusal to insure in the Shipowners' Association, the plaintiff writes on the 26th May :—

CANNING, May 26th, 1879.

[Copy for letter press.]

DR. HALEY :

Dear Sir,—Your postal card at hand, and you may place insurance on *Charlie*, \$3,000 at your figures, 3 to 3½; think it ought to be done for 3 per cent., but do best you can. Let me know soon as possible.

Yours truly,

D. M. DICKIE.

On receipt of which Haley writes to his principal, Mr. Wylde, on the 27th, as follows :—

WINDSOR, N. S., May 27th, 1879.

C. J. WYLDE, Esq. :

Dear Sir,— * * * * *

Also, will you take \$3,000, one-fourth barque *Charlie*, *Cochin*, *Allipee* and *New York*, at 3 or 3½ per cent. Please answer at once. 770 tons, built Oct., 1874.

Yours,

ALLAN HALEY.

To which Wylde replied :—

P. C. to A. HALEY :

I will take *Charlie* for voyage described for 3½ per cent.

(Sg'd) C. J. WYLDE.

On 3rd June Haley, who, it appears, had mislaid the letter of plaintiff of 21st May, giving the valuation of the vessel sought to be insured, wrote to the plaintiff :—

WINDSOR, June, 3rd, 1879.

D. M. DICKIE, Canning, N. S. :—

Dear Sir,—Do you mean policy on *Charlie*, \$3,000, ¼, valued \$5,000, equal to \$20,000 whole vessel ?

Yours,

ALLAN HALEY.

Which was replied to as follows on the 6th :—

CANNING, June 6th, 1879.

ALLAN HALEY, Esq. :

Your card received. I value $\frac{1}{2}$ barque *Charlie* at \$7,000 instead of \$5,000.

Yours truly,

D. M. DICKIE.

On the 4th June the following extract from Lloyds' list of Tuesday, 20th May, 1879, was published in the *Morning Chronicle*, of Halifax :—

" Extract from Lloyds' List of Tuesday, May 20th, 1879.

COLOMBO, May 19th, 1.20 p. m.

Charlie, British barque, bound hence for Alipee, struck the ground northwardly of Cormorin, and has put back leaky; cargo damaged, but to what extent not yet ascertained."

And on the same day Mr. Wylde calls Haley's attention to the information contained in the extract by the following telegram :—

HALIFAX, June 4,—9.

ALLAN HALEY, Windsor :

I notice *Charley* has been in trouble, but not on voyage named by you.

C. J. WYLDE.

Paid.

And on the following day he wrote him, declining the risk on the ground that he had heard she had been insured elsewhere on a different voyage from that described in Haley's letter of application of 27th May :—

HALIFAX, N. S., June 5,—9.

ALLAN HALEY, Esq., Windsor :

Dear Sir,—Yours 4th received. I have inquired at the "Nova Scotian" re voyage *Charlie*, and find that they have her insured from Cochin to New York via Colombo and Alipee; this altogether a different risk from the one offered to me, and consequently we are not on the risk at all. Please inform Mr. Dickie of this.

The *Charlie* sailed from Cochin about the 22nd April, 1879, and arrived at Colombo, where she was to take in a further portion of her cargo, on the following Thursday in April, where she remained till the 15th May following, when

she sailed for Alipee to complete her loading according to her charter, which the master states as follows:—"During the time of discharge (at Cochin) I chartered the vessel to take in a part cargo there, go to Colombo for more cargo of general merchandize, and from Colombo to Alipee to fill up, and from thence to New York." On the 17th April, while on the voyage from Colombo to Alipee, the vessel struck on a reef, twelve or fourteen miles to the eastward of Cape Cormorin, and sustained such injuries that she was obliged to put back to Colombo, where she arrived on the morning of the 19th May. The master procured a survey of the vessel to be made on the 20th, and the following report was made by the surveyors:—

SURVEY REPORT OF THE BARQUE "CHARLIE."

We, the undersigned having been called upon by Captain William C Robinson to survey and report upon the barque *Charlie* proceeded on board this day. We sounded the pumps and found she makes water to the extent of two feet per hour. It appears that she struck upon a reef of rocks near about Cape Cormorin, on her way from Colombo to Alipee.

We are of opinion that a part of her cargo must be damaged, and we therefore recommend that the cargo be discharged forthwith to enable us to examine her further.

Given under our hands at Colombo, this 20th day of May, 1879.

(Sgd.) JNO. BETTAH,
Master Mariner.

Received survey fee \$31.50.

(Sgd.) D. CUNNINGHAM,
Master barque *Lycurgus*.

Received survey fee, \$31.50.

(Sgd.) THOS. WILLIAMS,
Master barque *Corunna*.

Received survey fee, \$31.50.

In accordance with the recommendation of this survey, the cargo was discharged, the vessel at the time, as the captain testifies, making two feet of water an hour. The following extract from the master's evidence describes the situation of

matters at this time :—" We arrived at Colombo again about ten o'clock of the morning of the 19th May. (All my dates are civil time.) In going to Colombo at one time we had gained six inches on the leaks ; we sounded occasionally to see whether the leak gained or not ; with that one exception we always found the water about the same, the pumping just kept it under ; the crew were at the pumps all the time, they were never stopped except to sound ; on Monday morning, 20th May, I went on shore and got surveyors—three surveyors—who came on board and sounded the pumps and stopped pumping ; the water was then gaining two feet per hour ; they recommended the vessel to be discharged ; the first surveyors were three shipmasters ; we could not then examine her bottom on account of the sea ; it was the following Friday or Saturday before I could get any cargo out on account of the heavy sea running ; on the day we arrived there the south-west monsoon burst ; we got the cargo out as fast as we possibly could when we could get lighters alongside ; we got out what cargo we could, and I then got permission to shift the vessel further in and into smoother water ; we surveyed her bottom as soon as possible, and on the first day that it was smooth enough for them to work, I got divers to examine her bottom ; they reported that her keel was out ; they described the state of the bottom, that in some places the keel was flush with the garboard, and in some places it had gone inside of it, and that her copper was off as far as they could reach on either side ; that the sides of the garboard were broken out, and the end of the sternpost was exposed ; that at the after end the whole of the keel was exposed ; I knew that the divers were under the ship's bottom ; I verified their report that the end of the stern post was exposed by measuring it with a boat-hook, and I found there were twenty-two inches missing in the depth of the vessel ; I know that because I did it myself ; I afterwards had another diver to examine the bottom, and his report agreed with that of the others ; as soon as I arrived at Colombo I got men from the shore to pump the vessel, as my crew were tired out and two of them laid up ; I had most of the time ten men at the pumps relieving each other ; the pumps were kept constantly going ; the water kept about the same until as we got the cargo out the

pressure decreased and the leakage decreased ; she could not have been repaired at Colombo ; there is only about two and one-half to three feet of tide there, so that she could not be put on the beach ; there are not any shipyards there ; there were not any shipcarpenters there, and no wharf to heave her down to, and no blocks to put her on ; there were not any tug boats there ; I made enquiries as to what was best to be done with the vessel ; Bombay was the nearest port where the vessel could have been repaired ; Bombay was about 1,000 miles off ; I could not have sailed to Bombay nor to any other port with that vessel in the state she was in ; I should have experienced the south-west monsoon in going to Bombay ; the vessel was not in a fit state to go to any port ; in the position I was in I could do nothing else but make the most I could out of the wreck ; I consulted with C. W. Barteaux, at New York, by cable, as to what was to be done ; his orders were, when I had exhausted all available means to take care of the vessel, to do then the best I could for all concerned ; my first message to him was on the 23rd May ; the best thing I could do was to strip the ship and sell her, as she was eating her head off as she lay there ; that course was taken by the advice of the surveyors : I consulted with any person there who had any knowledge of what could be done."

On the 10th June a further survey was made, resulting in following report :—

COLOMBO, June 10, 1879.

Gentleman,—We, the undersigned, having been notified by Wm. C. Robinson, Master of the barque *Charlie*, relative to the holding of a survey on said vessel after the completing of the discharge of her cargo, as previously ordered by surveyors when the vessel arrived here after coming off the reefs at Cape Comorin,
State—

That we went on board at 12.10 P. M. and sounded the pumps, found sixteen (16) inches of water in the well. Ordered the men to cease pumping for one hour.

Then examined the ship on deck and found water ways, butts, and scarfs of main rail opened and strained. And

In the hold found the ceilings and keelson forward of main hatch raised four inches, and the lower fastenings of



the iron knees amidships forced up three-quarters of an inch, but further the vessel shewed no signs of being strained.

We then went on deck and into the boat, and with a boat hook and staff commenced to hook the vessel fore and aft, and found that only amidships, for about eight feet, could we feel anything like the keel, confirming the report appended given by the divers from the Colombo Harbor Works, who had previously examined the bottom of the vessel. On going on board again, we sounded the pumps and found twenty-five inches of water, she having made nine inches of water in the hour expired.

We therefore recommend that the vessel be moved into shallower water and the bottom be again examined by divers, and, if possible, for them to patch the broken places with felt and sheet lead, so as to enable the vessel to be taken to a port where she can be repaired, there being no available means at Colombo to repair the ship so as to complete her voyage.

We are, respectfully yours,

(Sgd.) JOHN NORTON,
Master of barque *Silas Curtis*.

(Sgd.) F. JORDAN,
Master of ship *Anglo America*.

(Sgd.) WILLIAM DOHERTY,
Carpenter.

And on the 9th July the final survey and report was made, when for the first time it was recommended that the vessel be sold. That report is as follows:—

On the ninth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, at the Port of Colombo, Ceylon,

We the undersigned shipmasters duly declare that, having been notified by W. C. Robinson, master of the barque *Charlie*, of Windsor, N. S., to hold a survey on his vessel, and to examine the report handed in by the European divers, who had thoroughly examined the bottom of the ship as ordered by the last survey,

Testify that we find the vessel making the same quantity of water and in the same condition as before reported; and

also, from examination of the log book, find that from the ship's arrival (or return) to Colombo, the pumps have been worked night and day by labourers and the crew.

Also, on interviewing the divers who made the examination of the ship's bottom regarding the state of it, they informed us that it was so much torn and splintered that it would be impossible for them to patch or repair it so as to make it safe for the vessel to proceed to sea.

Therefore, considering the heavy expense the master is under in keeping the ship pumped out, and the impossibility of repairing the vessel at this port otherwise than by divers,

We recommend for the interest of all concerned, that the cargo be forwarded to its destination and the ship stripped and sold at public auction.

FRED. JORDAN,
Master of ship *Anglo America*.

GEO. FREEMAN,
Master of barque *Chatenooga*.

Rec'd the fees	$\left\{ \begin{array}{c} \text{Stamp} \\ \text{of } \$31.50 \end{array} \right\}$	Rec'd the fees
of \$31.50		of \$31.50
F. JORDAN.		G. FREEMAN.

Acting on this report, the master stripped the vessel, had the materials, rigging, &c., taken on shore, and, with the vessel, sold at public auction. The date of the sale is not given in the papers before the Court. Mr. C. W. Barteaux of New York, was part owner and ship's husband of the *Charlie*, and the master, on the 23rd May, after the first survey, and as he says, "as soon as he had determined to discharge the vessel," cabled to Mr. Barteaux, informing him, I presume, of the condition of the vessel, (although the contents of the cablegram are not given,) and in reply was directed, "when he had exhausted all available means to take care of the vessel, to do then the best he could for all concerned." There was no notice of abandonment. The following are the statements of the captain, in addition to what is before transcribed, and of a seaman named DeWolf, which, with the reports of the surveyors, comprise all the information we have of the condition of the vessel at the date of her last

arrival at Colombo, and from that time till the sale. The master says:—

If I had owned the whole of that vessel and she had been uninsured, I would not have done anything else but what I did do; I acted just as if I had owned the whole vessel; I tried to raise money to repair the ship to enable her to perform the voyage, but could not succeed; if we could have repaired the ship at Colombo, the nearest place where we could have got timber for a keel would have been Rangoon or Moulmeni; there is not any skilled labour at Colombo; I mean shipwrights; only Hindoo Coolies; I stripped the vessel and sold the materials in lots at auction, and the hull was sold separately; the whole sales of the hull and materials was something less than 10,000 rupees, the hull alone brought 4,500 rupees; the sale was advertized at Colombo and on the coast, and at Point de Galle, in the newspapers and by hand-bills and by tomtoms; the purchaser of the hull proceeded to break it up as fast as he could; the first survey was 20th May by three shipmasters; after the cargo was discharged I had another survey, I think on 10th June, by two shipmasters and a carpenter of one of the ships there; one of those surveyors was captain of a ship of 1500 tons and the other of 800 tons; I made enquiry to see if it were possible to patch the broken places of the vessel so that she could proceed to a port of repair, but the divers said nothing could be done to her. (Objected to by Mr. Ritchie.) There was also a third survey by two shipmasters, captains Jordan and Freeman; one of them had been on the second survey; that was the final survey; I acted on the recommendation of those surveyors in stripping the vessel and selling the hull and materials. (Objected to by Mr. Ritchie.)

Cross-examined by Mr. Ritchie.—C. W. Barteaux was ship's husband; we completed our charter from Cochin about 12th April; we sailed from Cochin about 22nd April; I had no communication of any kind with Mr. Keith (plaintiff) nor Mr. Dickie; I wrote Mr. Barteaux from Cochin; I wrote him the day I chartered; it was mails day; I do not know whether I wrote him after that or not; I did not telegraph to him after that; I think we got to Colombo on the following

Thursday afternoon, about 48 or 50 hours; I think I wrote Barteaux from Colombo; I did not telegraph him from my first arrival until 23rd May; we were there about twenty-one days; we left Colombo on the evening of the 15th, and struck the reef on the morning of the 17th; the nearest port to Cape Cormorin is Colombo; Point de Galle is sixty miles further off and not as good a port as Colombo; Bombay was the nearest port where I could repair such a vessel; I could not repair at Trincomalee as far as I could ascertain; I have never been at Trincomalee; I did not telegraph as soon as I arrived at Colombo after the accident, because I had nothing special to say except that we had been on shore; I did not telegraph after the first survey because I did not then know what I was going to do; I did not decide to discharge the vessel until the 23rd; the proceeds of the sales of the hull and materials I used to pay the ship's bills with, pumping bills and bills for stripping her; it took all the money and more; I have not any copy of the telegram I sent to Mr. Barteaux.

(Sgd.) WILLIAM C. ROBINSON.

The seaman, DeWolf, says:—I think we arrived back at Colombo about the 19th or 20th May; the captain's name was William C. Robinson, of St. John, N. B.; the captain went on shore the day we got in; the next day he returned with some other captain and had a survey on the cargo; as soon as the weather moderated sufficiently the divers went down and examined the vessel's bottom; I think about 8 or 10 days after our return; her keel was knocked off amidships and some of her garboard streaks on both sides; I saw pieces of the garboard streaks come up while we were laying there, and we took it on board; I was there when she was discharged; the water had come up over the bottom tier of plumbago; I saw the bottom of the ship after the cargo was discharged; she was hogged amidships, and the ceiling next the keelson was bulged up; there was no chance there for repairing the vessel; no dry dock there, and no place to beach her so that we could repair her; she could not be repaired nearer than Singapore or Bombay, and she was not sufficiently seaworthy to sail to either of those ports; she was condemned

and sold at Colombo; she was stripped of her standing and running rigging, and all the blocks taken out, and all sent ashore separately; her sails were unbent and sent on shore; her yards were sent down and sent on shore; and her masts were taken out of her and sent ashore; and all her gear and cabin furniture, and wheel, compasses, binnacles, side lights taken out of her and sent ashore; all her materials were afterwards sold at public auction after notice given; I saw the notices posted up; there were two or three, and also on different days of different lots; I also saw the advertisement of the sale in the newspaper there; the hull was sold separately at public auction also; I joined another ship there and went to Calcutta and thence to London; I was back again at Colombo a year ago this month, when I saw the frame of the barque *Charlie* high and dry on the shore; it had been stripped of the planks, and houses, and deck; she was a vessel of 770 tons register; up to the time the vessel struck that reef she was in first-class condition; she had been newly coppered and was well found in sails and spars, and in every way she was tight and seaworthy; she was coppered just before we left New York, less than a year before; she was in the same good condition when we left Cochin for Colombo and from thence until the time she struck.

Cross-examined by Mr. J. N. Ritchie.—I have been going to sea since November, 1874, until about eight months since; I live at Scot's Bay; am 22 years of age; I joined the *Charlie* at Kingsport in this Province when she was launched; we left Cochin on this last voyage in April, 1879; about the first part of the month; vessel was in ballast; think vessel was then chartered; we sailed for Colombo; William C. Robinson was the captain then; I left him in Colombo and have not since seen him; he belonged to St. John, N. B.; think we arrived at Colombo in April; we were about two weeks loading; I knew what voyage we were bound on when we left Cochin; I knew we were going to Colombo and New York; we loaded three quarters full, or more, at Colombo; I do not know what direction Allipee is in from Colombo; do not know exactly the date we left Colombo; Colombo is a pretty large place, but not as large as Halifax; do not know what

course we generally steered after leaving Colombo—whether north, south, east or west; we were tacking all the time; cannot say how many days we were out before we went ashore; should think the place where we struck was about 300 miles from Colombo; I cannot give any idea of the direction it was from Colombo; I think it was handier to Colombo than to Point de Galle, but I am not certain; I never was in Point de Galle; we returned to Colombo because it was the handiest port; I won't be sure that Cormorin was the nearest land to where we got ashore; we were two days and a night getting back to Colombo; do not know whether the master communicated with his owners or not; I have not had any experience in repairing vessels.

Question.—Will you swear that there was not any port at which the ship could have been repaired nearer than Singapore or Bombay?

I will not swear that; but I say there are no ports nearer where there are dry docks.

I do not know of my own knowledge anything about the ports out there, except what I have heard; I have been at Singapore; I saw the survey held on the ship; I saw the divers go down to look at her bottom; that is all I saw done; I know nothing more about vessel being condemned than what I heard out there; I was not present at sale of the hull; know nothing of it except from hearsay; I was present at the sale of the spars, rigging and materials; the *Charlie* was coppered about a year before she was lost; suppose the vessel could have been taken to Point de Galle.

THOMAS DEWOLFE.

On these facts the defendant company contended:

1. That Haley, in procuring the insurance with the defendant company, was the agent of the plaintiff, and that the voyage on which he asked insurance, (see his letter to Wylde of 27th May,) and that which was accepted by Wylde, was a different voyage from that on which the vessel admittedly sailed, and, therefore, the contract alleged in the writ was not proved.

2. That the plaintiff had knowledge of the loss of the vessel before insurance completed, and wrongfully concealed that knowledge from the defendants.

3. That the letters of 3rd and 6th of June constitute a new and different proposition of insurance, which was not accepted, and, therefore, no agreement to insure is proved.

4. If contract proved, it is subject to the usual conditions contained in the policies of the company, and a deviation is proved under the 12th plea.

5. There was no total loss, actual or constructive.

6. The sale by the captain not justified by the necessities of the case or facts in proof.

The second ground was very properly not pressed at the argument, as, I think, we must accept the plaintiff's explanation, that, in consequence of his absence from home, he did not see the copy of the newspaper containing the Lloyd's extract till after he had written his letter of 6th June to Haley.

The first ground, namely, whether in procuring the insurance, Haley was the agent of the plaintiff or defendants, is, however, all important. There is no question as to the error or mistake in the instructions transmitted to Wylde by Haley in his letter of 27th May, in which the voyage was described as "Cochin, Alipee and New York," instead of "Cochin, Colombo, Alipee, and New York," and to which Wylde replied, "I will take *Charlie* for voyage described." *Parsons*, in his work on *Insurance*, says:—"The same person may be the agent of both parties, or, being the general agent of one, he may be made the special agent of the other; and this special agency may be inferred from circumstances. And if a party who desires to be insured employ a person who is agent of the insurers, and so employ him as to make him his agent, he is as responsible for the acts or omissions of such agent in his behalf as he would have been if that person had not been the agent of the other party." And in *FitzSimmons v. The Southern Express Company*, 2 Am. Reps., 577, it was held that one who voluntarily employs the agent of another, knowing the fact of that agency, is estopped from pleading the rule that the same person cannot be the agent of two principals having conflicting interests. In that case the

defendants, an express company, received goods which the plaintiff had sent to one of their stations addressed to the care of their agent, and it was held that the plaintiff had made the agent of the defendants at this station his own agent to receive the goods there, and the express company was held not liable for the loss while in the custody of their agent.

It is evident, I think, from the evidence of the plaintiff and Haley, that the relations of the latter with the defendant company and their agent, Wylde, were well understood by the plaintiff. He says he knew that Haley "acted for this company as well as for others," and it is clear, I think, from the tenor of the correspondence, that the first proposition to insure the *Charlie*, the letter of 21st May, was made to Haley not as the agent of the defendant company, but as the broker of the Shipowners' Association of Windsor. That was declined by Haley on the part of that association, and the rejection of the application was not received by the plaintiff with any protest or declaration that he did not intend his application for the Shipowners', but for the defendant company. The reply of Haley to this application is also very significant of the intention and meaning of the parties at that time. Haley does not say in reply, "I reject your application as the broker of the Shipowners' Association, but I will accept as the agent of the defendant company." On the contrary, he makes a proposition which may have implied his readiness to procure insurance for the plaintiff in any other company—"I think I could place her for you at 3 per cent. or 3½ per cent." It is not pretended that this constituted an insurance or agreement to insure, nor did the plaintiff receive the proposition in that light. He says in reply, "you may place insurance on *Charlie*,—think it ought to be done at 3 per cent., *but do the best you can, and let me know as soon as possible.*" It cannot surely be said that up to this time there is a particle of evidence that Haley acted as the agent of the defendant company, or that he even contemplated "placing" the *Charlie* with them. At this time, and till the receipt of Haley's letter of the 27th, the defendant company, and Wylde, their agent, had no knowledge of the negotiations between the plaintiff and Haley, and it is manifest that the plaintiff himself contemplated

further correspondence by Haley with some one before the insurance could be completed, or he would not have written, "*do the best you can and let me know as soon as possible.*" I am driven to the conclusion that in making the application for the insurance, which is the subject of this action, Haley was the agent of the plaintiff; and the result of that conclusion is that inasmuch as the insurance was effected for a different voyage from that on which the vessel sailed and was lost, the plaintiff must fail in this action. But, in my opinion, this is not the only difficulty in the plaintiff's way. Assuming the assurance to have been legally effected, it is contended by the defendant company that the facts in proof do not constitute an actual or constructive total loss of the ship. It must be admitted, I think, that the circumstances in proof would have justified the owners of the vessel in giving notice of abandonment and claiming for a constructive total loss. The evidence of the captain, although not altogether satisfactory, viewed in the light of the reports of the surveyors and divers, is uncontradicted, and he states that the vessel could not be repaired at Colombo, and that it would be difficult, if not impossible, to take her to a place where the necessary repairs could be effected. On this evidence it is that the plaintiff claims as for an actual total loss, on the admitted principle of law that "no abandonment is necessary, and no notice of abandonment is required where there is nothing to *abandon which can pass to or be of value to the underwriter*;" *Potter v. Rankin*, L. R., 6 H. L., 83. Mr. Graham contended that this being an action on an agreement to insure, and not on a policy executed by the company, a notice of abandonment was not necessary, even if, under the facts in proof, such notice should be considered necessary, were the action on the policy. He cited no authority for this, nor have I found any to justify such a contention. In *Knight v. Faith*, 15 Q. B., 647, the facts were stronger for the plaintiff than in the case at Bar. The *Pusey Hall*, on her voyage, endeavoured to make the harbor of Santa Cruz, in the West Indies, on the morning of the 16th September, 1846, whilst the tide was ebbing, and accidentally took the ground, swung round, and remained fixed on the bottom, which consisted of hard clay and rocks, until the flowing of the tide in the evening of the same day, when, after

thumping heavily for half an hour, she was at length, by assistance, got off and brought the same evening inside the bar, into the harbor Santa Cruz. The vessel received no injury after the 16th September; and remained, with her crew on board, in the harbor of Santa Cruz, where she was pumped from time to time, and her cargo discharged into other vessels, until the middle of October, 1846, when she was beached for the purpose of being surveyed; it was then found she was so damaged that she could not be repaired at Santa Cruz, there being no dockyard, workmen, or materials there, nor could she be taken to any place where she could be repaired. She was sold by the master, who was part owner, "for whom it might concern." There was no notice of abandonment, and it was held the insurers were not liable. The decision in *Knight v. Faith* has, so far as I know, been received as law ever since, unless it can be said to have been shaken by some observations of Mr. Justice BLACKBURN in *Rankin v. Potter*, L. R., 6 E. & I. Appeals, 83; but, it will be found, on a careful examination of the judgments delivered in that case, that the argument was based on the assumption that there was nothing to abandon, that in fact the ship was as if she had been sunk or broken to pieces. The point decided in *Rankin v. Potter* was, that where, at the time when the insured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject matter of the insurance has been sold so as to pass the property away, inasmuch as there was nothing of the subject matter of the insurance which he could abandon, notice of abandonment was not necessary. Mr. Justice BLACKBURN, speaking of notice of abandonment, says: "But I think this from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice. When they can do so, I think that the neglect to give notice of abandonment may determine the owners' election. This is a matter that is now of much greater practical importance than it was when Lord ABINGER delivered that judgment, (*Roux v. Salvador*,) for there the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later

still. Under such circumstances a notice of abandonment was often a very idle ceremony, and, in my opinion, unnecessary, if the facts did amount to a total loss, inoperative if they did not. Now when, by means of the electric telegraph, the underwriters' orders might promptly reach the spot where the ship was in peril, *a notice of abandonment may be of great practical importance.* What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, *and principally*, on what steps the underwriters might take if they had notice. *If there was nothing they could do, no notice, I think, is required."* In *Kolpinbach v. McKenzie*, L. R., 3 C. P. D., BRETT, L. J., thus expresses himself :—"I am not prepared to say that if it could be shewn that the subject matter of the insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear before notice could be received or any answer returned, that might not excuse the assured from giving notice of abandonment, *but I am prepared to say that nothing short of that would excuse him*, and, although I do not say what I have stated would excuse him, I am not prepared to say it would not, but that is the limit to which I think the doctrine could be carried, and it seems to me to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made part of the contract." In the same case COTTON, L. J., said :—"There is nothing in the observations of BLACKBURN, J., (in *Rankin v. Potter*,) which can possibly be construed to mean that, where the assured had in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters." In the case before us the insured received notice on the 23rd or 24th of May, and the vessel remained in their possession unsold till after the 9th July. And again, COTTON, L. J., says :—"Suppose, for various reasons, the ship in this case had not been sold for two or three months, it is obvious, if there had been notice to the underwriters, they might have done something, and we must not depart from the general rule laid down for

all cases, simply because, in a particular case, a jury might find that notice would have produced no good result; I think that where the assured, at the time he receives the information on which he is bound to make his election, has the thing insured in his power or under his control, he is bound to give notice to the underwriters." It will be kept in mind that here there was direct telegraph communication between Colombo and New York, where the ship's husband and agent of the owners resided; that the situation of the vessel was communicated to the agent, and his instructions received four or five weeks before the vessel was finally condemned and sold. And the plaintiff himself was aware, by his own admission on the 6th June, from the Lloyd's extract already referred to, that the vessel had met with disaster, and had to put back to Colombo in consequence. There is no direct evidence that he held personal communication with the master or Barteaux, but he had ample time and opportunity to hold such communication, between the 6th June, when he heard of the vessel's distress, and the date of sale in July. It cannot be contended that there was nothing which the underwriters could receive. Although the vessel was seriously injured she was kept afloat for several weeks after the injury was inflicted, and the hull and spars, when sold, realized a considerable sum of money. The question of justifiable sale by the master cannot arise here, as the sale was made by the master under the instructions of his owners, after they became aware of the condition of the vessel.

The rule for a new trial must, I think, be made absolute.

ERNST v. WATERMAN.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, JJ.

(Decided April 9th, 1883.)

Ejectment.—Right to soil ad medium flum vis, excluded by description in Deed.—Verdict cannot be supported on ground not left to the jury.

In an action of ejectment, the jury, in answer to a question put to them by the Judge, found that plaintiff, in selling the lots, one of which defendant purchased, announced that the colored places on the plan, one of which was the locus, were streets.

Held, that the presumption that defendant held *ad medium flum vis* was rebuttable by proof of the title being in plaintiff, and that under the description in defendant's deed designating the land, as indicated on the plan, and specifying the dimensions, which were such as not to include the street, the title to the street or any part of it, did not pass to defendant.

Defendants, at the argument, relied on a title by possession, but their pleadings set up only a documentary title, and the evidence of title by possession was not submitted to the jury.

Held, that the verdict for defendant could not be sustained by showing that, under the evidence, defendant had acquired title by possession.

This was an action of ejectment, tried before JAMES, J., at Lunenburg, October 13th, 1882. Plaintiff laid off a tract of land, of which he was owner, into lots and streets, according to a plan, and sold and conveyed to defendant lots on both sides of one of the streets. The action was brought to eject defendant from the part of the street lying between the lots purchased by him, he having fenced it in, and ploughed, and occupied it for several years. The learned Judge submitted the two following questions to the jury:—

1. Did the plaintiff, in laying out these lots, making this plan, and selling the lots, announce to the purchasers that the colored places on the plan were streets, and especially that this three rods colored on the plan was a street, as sworn by Edward Artz and others?

2. Did the plaintiff and defendant, when the survey was made by Lawson and they were together on the ground, agree, knowing what they were doing that the southern boundary of the plaintiff's property, and the northern boundary of the defendant's property should be a line running past the northern end of defendant's house and parallel with the southern line of the property? If not, was such an agreement made at any other time and when?

The jury answered the questions so submitted in the affirmative, with the exception of the last clause of the second question, which they answered in the negative. The learned Judge thereupon directed the jury to find a general verdict for defendant, and granted a rule on the usual grounds to set the same aside.

McCoy, Q. C., (and *W. H. Owen*,) in support of rule, were stopped.

S. A. Chesley, contra.—Plaintiff cannot bring three counts for ejectment from the same lands, but must be confined to the first count. We have a right to treat the second and third counts as non-existent, and can attack the first count. (*THOMPSON, J.*—The plaintiff should have the right to elect.) The first count describes nothing. (*RIGBY, J.*—Supposing the plaintiff's description unintelligible, I think you make it all right by defining what you defend for.) The plaintiff was entitled to a general verdict, and could get nothing else under the statute. He could not get a verdict for a part of the land for which he claims. We have proved a right to recover half the strip of land claimed. *Practice Act*, section 303. Our statute differs from the English statute. *Cole on Ejectment*, 285, gives the words of the English statute. Our statute expressly defines and limits the right to recover and precludes a partial verdict. There is no evidence of possession of any part of the land in the plaintiff within twenty years. (*RIGBY, J.*—That only amounts to this, that it should have been submitted to the jury. If the lot was ever vested in the plaintiff is it not incumbent on you to show that the lot which he sold you includes the lot about which the contention exists?) The deed from Ernst to Waterman, in connection with the plan, gives us one half the road. The case comes within *Berridge v. Ward*, 10 C. B., N. S., 400. The presumption is that the sale of land adjoining a road passes *usque ad filum*, if there is nothing to exclude it. (*RIGBY, J.*—Assuming your contention to be correct, it would only give you half the street.) The description is "lot No. letter A. as per plan." The plan was used at the sale. (*RIGBY, J.*—The plaintiff might be estopped from denying that the land on the plan was a street where he sells

lots from his own land by a plan on which streets are laid out, but I don't think he would be estopped from saying in such a case that he only intended to sell to the street. *Meagher, Q. C.*—The presumption is the same in the case of a public as a private road; 7 *C. B.*, 329.) We are in the same position under the evidence as if there had been an ancient highway.

Meagher, Q. C., (with Chesley.)—The defendant had a title by possession. (*RIGBY, J.*—The jury have not found that.) The plaintiff cannot complain of that. (*RIGBY, J.*—You were prejudiced if the question was not put to the jury.) That is not the way it is usually done. It is unfair to allow the plaintiff to lie by or to urge here that questions were not put to the jury when they did not mention the point below. (*RIGBY, J.*—If there was an onus anywhere it was with you.) We were the owners on the other side of the street previously. (*RIGBY, J.*—You cannot claim anything by that.) I admit it is pretty doubtful. There is uncontradicted evidence that plaintiff gave defendant possession of the locus. Defendant was then rightfully in possession, and no demand was made.

THOMPSON, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

We think that the evidence in this cause was sufficient to justify the findings of the jury in answer to the two questions which were put to them by the learned Judge who tried the cause, but we also think that, instead of directing a verdict to be found for the defendant, as the result of those findings, the learned Judge should have told the jury that the plaintiff was entitled to their verdict, whatever their opinion might be on the two points on which the questions were framed. The action was ejectment for a strip of land which abutted on a lot which the defendant had purchased from the plaintiff. The defence was that the locus was a way—public or private—and the evidence was such as to satisfy the jury, as they found in answer to the first question, that the locus was a way, or "street." The second question merely related to the establishment of a conventional line, and the finding on it left untouched the main question involved in this case, viz, whether the plaintiff is entitled to recover in ejectment,

notwithstanding the defendant proves that he is entitled to an easement of way over the locus, or that the public have such easement. At the argument the defendant's counsel sought to sustain the verdict by various contentions:—

1st. It was urged that the law presumes the ownership of half the soil over which the way exists, to be in the owners of the land on either side of the way, and that consequently the defendant was entitled to one-half the locus, being the half adjoining his lot of land; also, that although the defendant's conveyance should bound his lot on the way or street, the ownership *ad medium filum viae* would also pass. 7 C. B., N. S., 329, and 10 C. B., N. S., 400, were cited to sustain this double proposition. As regards the first branch of this contention, we have to observe that the presumption is by no means conclusive, and may be rebutted, as was done here, by proof of title being in another than the owner of the contiguous land. As regards the second branch, it will be found that the application of the doctrine depends in every case on the language of the conveyance, and it cannot be contended that all deeds, no matter what the description may be, will pass the title to half the adjoining ways. The description in this deed, we think, excluded the soil of the way, because it not only designated the land conveyed as a certain lot indicated on an annexed plan, but specified the dimensions which the conveyed parcel was to contain, and these dimensions do not admit of any part of the way being included. The cases above mentioned sustain these views and also the case of *Pugh v. Peters*, 2 R. & C., 143.

2nd. It was urged that the defendant had shown a title by possession. All that can be said in favor of this proposition is that there was some evidence on that point, but such evidence was not submitted to the jury, who were told that they must find for defendant, because of their answers concerning the way and the conventional line. Defendant's counsel argued that plaintiff's counsel was in fault in this particular—that he should have urged that the question of fact, as regards possession, should be submitted to the jury. We cannot adopt this view. The plaintiff claimed, under a documentary title, and it was quite outside the line of his counsel's duty to request that the Judge should put to the

jury whether the defendant had not made out a title by possession. We rather think that the defendant's counsel, if any, were to blame, in obtaining a verdict on grounds which would not sustain it, and in not directing the attention of the Judge to a defence which they now claim would have sustained this verdict, if the verdict had rested on it. In saying this we do not wish to be understood as expressing any opinion in regard to the weight which should have been attached to the evidence with reference to possession.

3rd. It was urged that a demand was necessary before the commencement of this suit. Assuming a demand to have been necessary, we regard the evidence as sufficient to answer the objection. There was not only evidence of a demand, but of a disavowal, on the part of the defendant, of any claim to hold the locus.

In support of our view, that a plaintiff may recover in ejectment, notwithstanding the evidence of a way over the locus, we may refer to the cases already mentioned and to *Goodtitle dem. Chester v. Alker et al*, 1 Burr., 133; *Queen v Abp. York*, 14 Q. B., 81; *St. Mary's, Newington v. Jacobs*, L. R., 7 Q. B., 47; *Goodson v. Richardson*, L. R., 9 Ch. App., 221, and *Reg. v. Pratt*, 4 E. & B., 860.

The rule *nisi* to set aside the defendant's verdict must be made absolute with costs.

ESSON ET AL. v. WOOD.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, JJ.

(Decided April 9th, 1883.)

Plan rejected for want of evidence to connect it.

DEFENDANT sought to set aside a verdict for plaintiffs in an action of trespass for cutting and removing the plaintiffs' wharf, on the ground that a plan offered by defendant, which was admitted to have come from the Crown Land office and was signed by the Surveyor-General, but "was proved in no other way had been rejected. There was no evidence before the Court, and, assuming that the plan could be received for that purpose, there was none on the face of the plan to connect it with the title of any of the parties to the suit.

Held, that the plan was properly rejected. *

* The other questions in the cause turned wholly on the evidence.

This was an action of trespass for the removal of a wharf which was in course of construction by plaintiffs, in the city of Halifax. The land upon which the wharf was in course of construction extended into, and was covered by the waters of Halifax harbor, and was, at the time of the alleged trespass, in the possession of James F. Phalen, a tenant to the plaintiffs. Defendant, among other things, pleaded that at the time of the alleged trespasses and grievances defendant was possessed of a wharf and premises adjoining and to the north of the property in said writ mentioned, the owners and occupants of which had, for the period of twenty years and upwards before this action, enjoyed at all times, as of right and without interruption, the easement, right and privilege of having free and uninterrupted access from and to Halifax harbor to and from the south side of said wharf with steamers and vessels, and of mooring and fastening the same there while they took in and discharged cargoes, and for other purposes; and because certain piles and timbers wrongfully obstructed and interfered with said rights and easements, the defendant removed said obstructions, doing no unnecessary damage in that behalf which are the the alleged trespasses.

The cause was tried at Halifax in May, 1882, before Mr. Justice WEATHERBE, without a jury, who found that the alleged trespasses were committed by the defendant within the limits of the property described in a grant from the Crown to John Esson et al, dated 16th July, 1861, and directed a verdict to be entered against the defendant on all the issues for \$175, at which sum the damages were assessed. A rule was taken to set aside the verdict so found, and for a new trial, which was argued February 5th, 1883, by *Ritchie, Q. C.*, and *Sedgewick, Q. C.*, in support of the rule, and *Meagher, Q. C.*, contra.

RIGBY, J., now (April 9th, 1883,) delivered the judgment of the Court:—

The defendant, Wood, having removed a portion of a structure which was being erected adjoining plaintiffs' wharf, in the City of Halifax, this action was brought by the latter to recover damages for an alleged trespass, and it was tried

before Mr. Justice WEATHERBE, in May last. Plaintiffs claimed title to the locus under a grant from the Crown of May 21st., 1861, and the learned Judge found that the acts complained of were committed within the limits of the property described in that grant, and a verdict found against said defendant, Wood, on all the issues. One of the grounds upon which we were asked by defendant's counsel to set this verdict aside was that a plan offered by them at the trial, admitted to be from the Crown Land Office and signed by the Surveyor-General, but proved in no other way, had been improperly rejected. We were told that the case of *Wiggins v. MacLean*, 1 Allan N. B. Reps., p. 671, was an authority for this contention; but the surveyor's return involved in that case was treated as an original and authentic document upon which the plaintiff's grant was founded, and it was received, as stated by Mr. Justice STREET, who tried the cause, because the grant was founded upon it, and CARTER, J. said that it was clear if the return had not been admitted at all that the verdict was right, and therefore no injustice could be done by refusing the rule to set aside the verdict. In the case of *Walker v. Bayers*, 3 N. S. Decisions, 270, it was held that two plans which came from the Crown Land Office, which had been there for thirty years, but of which neither the origin nor history was given, nor was it shewn that they were regarded in the office as authentic, were properly rejected. There is no evidence in the case before us, nor, if we could examine it for that purpose, upon the face of the plan, to connect it with the title of any of the parties to this suit, and we cannot see upon what principle it can be seriously contended it was receivable as evidence. The only other points urged upon us at the argument, depended upon questions of fact, and in relation to which it will be sufficient to enquire whether the evidence supports the findings on them in favor of plaintiffs. The first of these is that the starting point of plaintiffs' grant of 1861 was not proved, and the position of that grant not identified so as to bring the alleged trespass within it. The description of the grant in question begins on the southern line of the public dock at the eastern end of Salter street, and on the north eastern angle of the wharf property of the said Esson, Boak & Company. There is a plan annexed to this

grant purporting to be made upon a scale of 100 feet to an inch. William A. Hendry, a surveyor for forty years in Halifax, was examined as a witness for plaintiff at the trial; he stated that he knew the property in question in 1844, and then surveyed it, and several times since; he made the one for the grant of 1861, in evidence; he also made a survey of the wharf property occupied by the defendant, and which is the adjoining property north of the locus. He produced a plan which he stated correctly represented the respective wharves and buildings of plaintiffs and defendant, as they were upon the ground, and he swore that the point of beginning in the grant of 1861 was marked in his plan as follows:—"Begin 400 feet from Water Street," and that his plan exactly corresponds with the plan attached to the grant of 1861, as to the north line of plaintiffs; and he also proved that the alleged trespass was within such line, which also appeared on reference to this plan. Although it was pressed upon us that inferences could be drawn from the plans inconsistent with these statements, yet the defendants offered no testimony to rebut the positive allegations of this witness as to the locality of the grant of 1861.

The other point taken by defendant's counsel was that his 11th plea had been made out justifying the removal of the structure because it wrongfully obstructed an easement which he had acquired by a user of twenty years and upwards, of having free and uninterrupted access from and to the Halifax harbor to and from the south side of his wharf, with steamers and vessels, and of mooring and fastening the same there while they took in and discharged cargoes, and for other purposes. Assuming, for the purposes of this judgment, that any evidence was given which, if uncontradicted, would establish such an adverse, exclusive and uninterrupted user of the water in question as would support a verdict for defendants on this plea, yet still it seems to us, even without reference to the plaintiffs' witnesses in rebuttal on this point, that there was ample evidence to the contrary. Since 1870 defendant has added 100 feet to his wharf, opposite to which and not to the wharf, as it existed prior to that date, the alleged obstruction was being erected. In 1879 he petitioned the Lieutenant-Governor for a grant of the water lot over which the easement

is now claimed, and described it as Crown Lands unoccupied and unimproved; and his witnesses, Kennedy, Twining and Salter testify that it was also used by the proprietors of the wharf now belonging to plaintiffs, and indeed by every body who wished to use it. This being the state of the evidence on these remaining points urged in favor of setting aside the verdict, we see no reason to interfere with the finding of the learned Judge who tried the cause.

The rule *nisi* will be discharged with costs.

RE GOLD MINING AREAS, WAVERLEY.

Before McDONALD, C. J., and WEATHERBE, and RIGBY, JJ.

(Decided April 9th, 1883.)

Contemporaneous applications for lease of mining area.—Priority.—Appeal allowed on the ground that a material point was not considered.

AFTER investigation before the Commissioner of Mines to determine which of a number of applicants for a lease was entitled, the Commissioner decided in favor of one O'Toole on the ground of priority. The several applicants were all present at the Mines Office on the morning on which the areas were presumed to be open for application, and on the Market Clock commencing to strike, a struggle took place between them in the endeavour each to be the first to bring his application to the notice of the Commissioner. O'Toole had entered the area under a lease from Wallace the original lessee and the present appellant, but had claimed that the agreement between himself and Wallace had terminated sometime before the application. The lease was in writing and was not put in, and there was nothing to show that the proviso for terminating it was one of which O'Toole could avail himself. The Commissioner in his decision intimated that he had nothing to do with this branch of the inquiry.

Held, That the Commissioner was wrong in deciding the matter on the mere question of priority, and should have considered the point that, as the holder of a chattel interest under Wallace, O'Toole could not lawfully do any act to defeat the title of his lessor; and as this point had not been considered the appeal must be sustained with costs.

This was an appeal from a decision of the Commissioner of Public Works and Mines. On the 18th February, 1881, the Commissioner of Mines declared certain gold mining areas situated at Waverley, in the County of Halifax, forfeited, for non-performance of the conditions of the lease under which they were held. The judgment of forfeiture was registered on the 21st March, 1881, at 10 o'clock, A. M., and, at the same time, applications were made for the areas by the appellants and a number of others. An investigation was held by the Commissioner for the purpose of determining the question

to which of the applicants for the areas the lease should be made, at which evidence was taken on behalf of the various parties under oath. The circumstances under which the applications were made are indicated in the following extracts from the evidence:—

C. H. Carman, the clerk to whom the applications were made, said: "There were a number of applications. The first that reached my hands were O'Toole's and McDonald's, The others were made while the clock was striking, and I gave receipts in the order I received them, as far as I could know. On first stroke of clock O'Toole and McDonald handed their applications to my hand; the others were not put into my hands, but were put on the table or desk. I cannot say whether their applications came to my hand before others laid on table."

W. R. Foster, one of the applicants, said: "I was standing at the table when the clock commenced to strike. Mr. Carman was at the desk. Ten o'clock was said; a scramble took place; a number of hands were stretched out to him. I hopped around the table, and my application was fourth or fifth, so I discovered afterwards by the order in which they were taken. A large number, including my own, were in before the clock had made four strokes."

Thomas A. Wallace, the appellant, said: "I was sitting at the corner of the desk watching the clock, and as the minute hand came up to the figure XII. for ten o'clock, I moved up to Mr. Carman, and the instant the first stroke sounded I pushed my application under Mr. Carman's hand, (left hand), on the desk. As I moved away from Carman I saw others on other side, and saw Mr. O'Toole there then. Five \$20 notes accompanied my application. The notes were folded in the application. There was a rush, I watched Mr. Carman and not the others. After two or three seconds Carman took my application and laid it upon the desk in front of him.

Charles R. Fairbanks, who was present, in company with O'Toole when the applications were made, said: "As the clock was striking ten O'Toole handed in his application, with the money, to Mr. Carman, saying, "ten o'clock—first application." Then the others all came rushing in, handing their applica-

tions to Mr. Carman, and some of them shouted out to Mr. Carman, "next," "third," "fourth," and so on, and Mr. Carman was perfectly besieged with applications and money laid down before him. Mr. Carman made use of the expression, "I am not a machine," and said, pointing to Henry O'Toole, "This man claims to be in first, and I must give him his receipt."

Henry O'Toole said: "The instant I heard the clock commence to strike ten I laid this application, with the money inside of it, in Mr. Carman's hand, and said, "first application. Mr. Carman." It was the first application made that morning after the clock commenced to strike. At the first stroke I heard of the clock I heard Mr. Carman say, "I am not a machine, and have not got a dozen hands," after he had four or five applications in his hands. I think Mr. Carman said, "gentlemen, there goes the clock." He said, "this man is first," in respect of my application. There were other applications offered after I offered mine and he had taken it. My receipt was the first he gave."

On cross-examination O'Toole admitted that at the time his application was made he was in possession of the areas in question, and was working them under a lease from T. J. and J. A. Wallace. He was examined by T. J. Wallace as follows:

Q.—How many men were working on that property?

A.—I can't say; on an average about 5 or 6 men; sometimes less than 4. A paper signed by T. J. Wallace and T. A. Wallace was what we had to go in on the property under. We went to work there by the consent of you and your son, and we held it. We went on property from consent of you or your son, under a paper for a twelve month. I consider the time is up, according to the agreement. I took the property for twelve months about the first of last July. The agreement stated that if we ceased work for thirty days the agreement would be void. I stopped work about the 14th February; my men stopped the 15th February. There were no men working for me after the 16th February. I had a partner, Mr. Cribby, working there with me. He did not remain there working after the 16th. I was not asked by you or your son, or anyone for you, to leave; but I will not swear you did not interfere by dictating. Only a day or so

before I left I spoke to you, said "good morning," coming from the crusher. You spoke to me about the working of the mine before Christmas, and dictated to us about the working of the mine. In latter part of November or first part of December, I think there was a request made to you for a longer lease. It was not as to the renewal of lease that the conversation took place. I don't know as I ever spoke to you about a lease. I think I spoke to your son; Mr. Cribby, I think, spoke to you. A copy of a paper as to working this property was read to me, in December, I think. In June or July Mr. Cribby, of whom I was a partner, took a paper under which I worked on this property. I did not sign it. At time I came here to forfeit property I had some men working on the property, and continued to work some time afterwards, till 14th or 15th February. I told a man I had put up a notice. When the notice was put up I did not know that you and your son and family were on this property. All summer I was living in the crusher; not on this property, to best of my knowledge.

The Commissioner of Mines, having heard the parties, pronounced the following decision :—

The foregoing testimony, taken in an investigation before me, as Commissioner of Public Works and Mines, commencing on the 22nd day of April, A. D., 1881, and being adjourned from time to time by the consent of the parties interested, and having come to a final close at the time above stated, was had for the purpose of investigating and determining the question as to whom of a number of applicants who applied on the 21st day of March last for a lease of 45 areas in Waverley Gold District, County of Halifax, which areas had been formerly leased under Lease No. 124 of said District, and which lease had been forfeited in due course of law for non-compliance by the lessee with the conditions of said lease.

In the course of the investigation questions were raised between the contestants, and evidence taken in reference thereto, which do not come within the jurisdiction of the Commissioner of Public Works and Mines to decide upon.

Upon finding that the areas contained in the said forfeited lease were open to be leased, at ten o'clock a. m. of the said 21st of March last, and that it was claimed by or on behalf of

each of the following parties, viz., Henry O'Toole, D. A. McDonald, J. H. Abbott, W. H. Weeks, E. V. B. Foster, Wm. R. Foster, George E. Faulkner, Jas. G. Foster, T. A. Wallace, J. Leslie Jennison, that he was entitled to a lease of the said areas in virtue of an application having been made by him, or on his behalf, at the proper time and in the proper manner for such lease, it became necessary to have an investigation in order to decide who was entitled to the lease applied for.

Now, having duly considered the foregoing evidence, and heard the allegations made and arguments produced by or on behalf of the parties contestants, I am of the opinion that upon the ground of priority of application for a lease of the said areas by Henry O'Toole, he is entitled to a lease of the same, and I do hereby decide that a lease of said areas be forthwith granted to him, the said Henry O'Toole.

From this decision T. A. Wallace appealed on the following among other grounds:—

Because I was the first who made application for the said areas, or, at all events, was as soon as any applicant therefor.

Because only one of the questions was decided, while several material questions were raised, and should have been decided.

Because the said O'Toole, being a lessee of the said areas at the time of his application, could not apply therefor and thereby deny and dispute my title I being his landlord.

The appeal was argued December 22nd, 1882, by *T. J. Wallace* in support of the appeal, and *B. H. Eaton, Graham, Q. C., and Sedgewick*, contra.

RIGBY, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

After an investigation held by the Commissioner of Works and Mines, for the purpose of determining to whom, of a number of applicants, a lease of certain areas in Waverley Gold District should be awarded, he decided in favor of Henry O'Toole, on the ground of "*priority of application*;" and from this decision Thomas A. Wallace, another of the applicants, appealed. The areas were assumed to be open to such applications at 10 o'clock, a. m. of the 21st March, 1881, and

before that hour these and other intending applicants were present in the office of the Commissioner, and when the market clock commenced to strike the hour a struggle took place between them, in the endeavour, each to be the first to bring his application to the notice of the officer who was to receive it, and I doubt whether, upon these facts, it was competent for the Commissioner to decide that the applications were otherwise than simultaneous. In the statement of his decision he also says that "in the course of the investigation questions were raised between the contestants, and evidence taken in reference thereto, which do not come within the jurisdiction of the Commissioner of Public Works and Mines to decide upon." O'Toole, the respondent, when cross-examined at the investigation, admitted that he and a partner had been in possession of the areas applied for, under the appellant and his father, that they took the property for twelve months, from July 1st, 1880, and that in the latter part of that year they had applied to Wallace, Sr., for a longer lease. His testimony would also indicate that he claimed that the agreement under which they were so entered, had terminated in March, 1881, because they had stopped work on the areas in February, and the agreement stated that if they ceased work for thirty days it would be void. The lease was in writing and was not produced, but no objection was made to this evidence of its contents. It would not appear, from the evidence, that the alleged proviso for avoiding the lease was one of which O'Toole and his partner had the right to avail themselves, and we are of opinion that O'Toole could not lawfully apply for or accept a lease from the Crown as against Wallace, while holding those areas as a tenant under the latter. In the case of *Saunders v. Lord Annesley*, 2 Schoale and Lefroy, 73, the Lord Chancellor held that a person holding a chattel interest under another could not lawfully do any act to defeat the title of his lessor, during the continuance of the lease, (see marginal note, p. 96.)

As we think that the Commissioner was wrong in deciding the contest on the mere question of priority of application, and should also have considered the effect of the evidence upon the point to which I have adverted, the appeal must prevail with costs.

McFATRIDGE ET AL. v. CARVILL.

Before SMITH, JAMES, and THOMPSON, J.J.

(Decided April 9th, 1883.)

Principal and Agent.—Receipt not conclusive.

PLAINTIFF hired a vessel to N. & Co. to carry a full cargo from Halifax to Liverpool, the freight to be £250, and the plaintiff to take the freight and primage, as per bills of lading, to the extent of £250, in final payment at Halifax, without recourse on N. & Co., whose responsibility was to cease as soon as the goods were on board, the vessel holding a lien on the cargo for freight. The deficiency, if any, was to be paid by N. & Co., and the excess over £250 to be provided for by master's draft against freight. Of the freight on the cargo, £352 was payable by third persons, and £296 7s. 8d. by N. & Co., making in all £1,047 7s. 8d., being an excess of £197 7s. 8d., for which the master accepted, payable at the office of defendant, who, in this transaction, was the agent of the plaintiff. The acceptance was endorsed before maturity to P. & B., for value. At Liverpool the master gave an order in writing to defendant's house to pay the draft out of the freight first collected. Defendant only admitted having collected £517 8s. 0d., of which he paid to the captain £35 15s. 7d., the balance being accounted for thus: "Disbursements, £284 4s. 0d.; paid acceptance of N. & Co., £197 7s. 8d." The captain, after learning the items of the account, some of which were professedly unsettled, being stated as "about" the sums set down, gave a receipt for the £35 15s. 7d., but shortly after wrote defendant, disputing the correctness of the account, and expressly notifying the defendant not to part with the £197 7s. 8d. deducted from the freight.

Held, that the receipt could not be relied on as conclusive in an action by the plaintiff against the defendant for money had and received, and that the items of disbursements could only be given under a plea of set-off.

Held, further, that the endorsement of the acceptance to P. & B. gave them no lien on the fund in Liverpool, and that they could not complain of the revocation of the captain's order to pay the draft; and that, apart from this ground altogether, the defendant, as the agent of the plaintiff, was bound to account to his principal, and could not set up the rights of third persons in an action by the principal.

Held, also, that the action for money received was properly brought by the plaintiff as principal against the defendant as his agent.

Action on the common counts to recover money received by defendant for freight earned by the barque *Magnolia*, under a charter party for a voyage from Halifax to London or Liverpool, G. B. The cause was tried at Halifax before SMITH, J., without a jury, who found a verdict for defendant. A rule was taken to set the verdict aside and for a new trial, and was argued December 22nd, 1882, by *Tupper* and *Pearson* in support of rule, and *McCoy*, Q. C., and *Meagher*, Q. C., contra.

THOMPSON, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

The plaintiff, on December 28th, 1877, hired by charter party his barque *Magnolia*, of 478 tons, to J. B. Neilly & Co., to carry a full cargo from Halifax to London or Liverpool,

G. B. The freight was to be £850, and the plaintiff was to take "the freight and primage as per bills of lading," to the extent of the £850, in final payment at Halifax, without recourse, on Neilly & Co., the deficiency, if any, to be paid by Neilly & Co., in cash, and the excess, if any, "to be provided for by master's draft against freight." Neilly & Co.'s responsibility was to cease as soon as the cargo was on board,—the vessel holding a lien on the cargo for freight. A commission of $2\frac{1}{2}$ per cent. on the £850 was declared by the charter party to be due to Pickford & Black, on the signing of that instrument. There was also the following clause: "Freight payable as follows, viz., $\frac{1}{3}$ in cash when cargo loaded in Halifax, and remaining $\frac{2}{3}$ by good and approved bills, payable in London or Liverpool, in cash, on unloading and right delivery of cargo." The vessel was loaded in Halifax, and the freight payable on that portion of her cargo which was embarked by third persons was£ 352 0 8 while there was payable on goods of Neilly & Co. 695 7 0

Making a total freight of£1047 7 8

Of this sum, as we have seen, the plaintiff was to have only £850, and it is contended, on the part of the defendant, that Neilly & Co. were entitled to have the balance of £197 7s. 8d. provided for by master's draft against freight, or, in other words, that the hire of plaintiff's vessel was to be paid for thus:—

To be collected from third person having goods

on board.....£352 0 8

$\frac{1}{3}$ in cash on acct. freight of Neilly's goods..... 231 9 0

Total cash receivable in Halifax£683 9 8

To be collected in London or Liverpool on Neilly's

goods and appropriated to plaintiff's freight

out of Neilly's balance of £463 18 0..... 266 10 4

Total freight payable to plaintiff£850 0 0

It would be, apparently, rather a peculiar transaction, if, as the result of this contract, Neilly & Co. were entitled at Halifax from the plaintiff or his master, a draft for £197 7s. 8d,

payable in England out of £463 18s. 0d., there payable by Neilly to the plaintiff. One would have supposed that the freight would have been adjusted thus:—

Payable from third persons and their goods....	£352	0	8
" in cash by Neilly & Co.....	231	9	0
" in London by do.	£463	18	0
Less surplus of freight payable to Neilly in Liverpool	197	7	8
	266	10	4
Total.....	£850	0	0

The defendant was the agent of the plaintiff in relation to this voyage of the *Magnolia*. On the 22nd January, 1878, and before the sailing of the vessel from Halifax, the master gave to Neilly & Co. his acceptance for £197 7s. 8d., payable at the office of the defendant in Liverpool, as we must assume from the evidence and the verdict, by the authority of the plaintiff, and as being the "excess of freight," which, under the charter party, Neilly was to get from the plaintiff. The master only, so far, was bound by this acceptance; but, at Liverpool, on March 1st, 1878, the master gave an order in writing to defendant's house to pay this draft "out of freight first collected" of the *Magnolia*. Even assuming that there had been paid in Halifax the one-third of the freight on the whole cargo, as stipulated for in the charter party, there was £698 5s. 2d., (being the other two-thirds of the whole freight, £1047 7s. 8d.) payable to the defendant as the plaintiff's agent in Liverpool, but the defendant only admitted, by the account (H. W. S., 2) receiving..£517 8 0 of which he paid to the captain..... 35 15 7

leaving to be accounted for in this suit.....£481 12 5

The defendant undertakes to account for this balance thus:—

Disbursements on account of vessel, &c., in Liver- pool.....	£284	4	9
Paid the acceptance in favor of Neilly & Co....	197	7	8
	£481	12	5

As to the £284 4s. 9d. for disbursements, the only evidence that this sum was paid out, or was in any way a proper charge,

is that the account, showing the items, was delivered to the captain, and that after he had examined it he gave a receipt for the £35 15s. 7d. of cash, in which he called that sum the balance due to barque *Magnolia*. The account was dated 6th April, 1878, and the receipt 8th April, 1878. We do not find it necessary to consider any niceties as to the weight and value of such an admission in an action like this, where it is claimed that the whole transaction can be opened up, because we find in evidence a letter, produced by the defendant, bearing even date with the receipt, from the master to the defendant's house, in these terms:—

I have received from you the accounts of my vessel, the *Magnolia*, showing, according to your way of making it, £35 15s. 7d. due my owners. I have received this amount, as you are aware, on account, and not as full settlement. There are several items in the account that are not correct; besides you have deducted £197 7s. 8d. from the freight, which is not right, and I beg to notify you that I claim, on behalf of myself and owners, the amount justly due them. You will also clearly understand and take notice that you are not to part with the £197 7s. 8d. deducted from the freight.

Yours respectfully,

ISAAC HILLIER,

Master barque *Magnolia*.

After this letter it is difficult to see how the defendant can contend that the admission in the receipt remains available as evidence that the items in the account are correct, and that the £35 15s. 7d. was given and received as such a payment in full as would relieve defendant from being called on for further proof as to the manner in which he had disposed of the money "had and received" to the use of the plaintiff, out of the freights of the *Magnolia*. There is, moreover, no plea of set-off, such as would be necessary to enable the defendant to avail himself of the charges in the account. It is also worthy of notice that two of the charges contained in the account are therein stated thus:—"Towage out, about £7; pilotage out, about £3 4s. 0d." These items, at least, can hardly be considered, in the absence of evidence on the point, as settled in full by an account in which they

are so set forth, and if they are not settled in full, but left to be adjusted when the amount should be correctly ascertained, and after the departure of the vessel, as was evidently intended, the whole account must be considered as not conclusively settled at the time. In reference to the defendant's claim to be allowed £197 7s. 8d. as paid for Neilly's draft, it should be observed that there was no evidence when the defendant paid it, or, indeed, any evidence that it was ever paid at all, excepting the controverted evidence that at some time before the suit the acceptance was delivered up to the plaintiff or his agent by the defendant or his agent. The authority of defendant to pay this draft was the order of 1st of March, 1878, given by the captain. In the account of 6th of April, 1878, the acceptance is not charged as having been paid, but charged as it would have been if the money was merely withheld for it, thus:—"Less captain's acceptance payable out of first freight, £197 7s. 8d." On the 8th of April it will be seen that the captain protested against this deduction, adding: "you will also clearly understand and take notice, that you are not to part with the £197 7s. 8d. deducted from the freight." It was not proved or contended that the acceptance was paid before this emphatic countermand of the authority to pay it reached the defendant. If such were the ground on which this allowance is claimed, we should probably require that the fact should be clearly proved, and perhaps would send the cause back for a new trial, to have doubt on that point removed; but the claim to have this sum allowed the defendant was put on the ground that after the master had given to Neilly this acceptance in Halifax, Neilly had endorsed it for value to Pickford & Black, who were the holders of it when the defendant paid it, and that the rights of a third party—the firm of Pickford & Black—would be affected by the countermand. The cogency of this answer, even if it could under any circumstances be set up by the defendant, is removed by a retrospect of the facts. The acceptance was endorsed to Pickford & Black for value, probably before maturity and without notice of any defence, but it was the draft of Neilly on the master, accepted by the latter, and gave to Pickford & Black no lien on the fund in Liverpool, and no claim on the defendant whatever. It was

only after that endorsement, and while in Great Britain, and without reference to Pickford & Black, so far as appears by the evidence, that the master gave to the defendant the authority to pay the acceptance. Pickford & Black could hardly complain of the rescission of an order which they had not bargained for, or had knowledge of, and which could be rescinded without their losing any of the rights which the acceptance gave them, and on which alone they had advanced this money. The law, however, puts aside this answer of the defendant, setting up the rights of Pickford & Black. He was the agent of the plaintiff, he received the freight moneys in no other capacity, he was bound to account to the plaintiff and to him alone, he could not constitute himself an arbiter between his principal and claimants against his principal, or call upon his principal in this action to meet the claims of third persons. This rule is well established in the following cases: *Hardman v. Wilcock*, 9 Bing., 382, n.; *Gibson v. Minet et al.*, 2 Bing., 7; *Nicholson v. Knowles et al.*, 5 Mad., 47; *Stonard v. Dunkin et al.*, 2 Camp., 344; *Dixon et al. v. Hammond*, 2 B. & Ald., 310; *Roberts v. Ogilby et al.*, 9 Price, 269; *Gosling v. Birnie*, 7 Bing., 339; *Crosskey v. Mills*, 1 C. M. & R., 298. Defendant's counsel contended that the action for money had and received would not lie; that the money was not the plaintiff's, but the money of Neilly or of Pickford & Black, as being the surplus of freight over £850. The principle just referred to and the cases just cited completely meet this contention, but the facts do so, irrespective of this principle. Instead of getting his £197 7s. 8d., excess of freight, deducted in Halifax from the freight which he should otherwise have to pay in England on his own goods, Neilly chose the somewhat singular course of letting his goods go forward, subject to a lien for the amount of their freight, (or two-thirds of it.) He would thus have to pay to the master, or the plaintiff, or the plaintiff's agent, in England, the freight on his goods, and he chose to rely on the master's acceptance for his surplus of £197 7s. 8d. How then can it be contended that the freight money was not the plaintiff's, but Neilly's or Pickford & Black's? It may be that the taking of this acceptance was a convenient proceeding for Neilly, as it would enable him to raise money on the accept-

ance immediately in Halifax, while he would not have to pay the freight until the end of the voyage, at any rate, he and his endorsee cannot complain if they are left to the rights and remedies which the transaction itself gave them,—recourse by the endorsee against the parties to the acceptance itself, and recourse, probably, for Neilly, under the charter party against the plaintiff, unless there has been a deficiency in the freight caused by his own default.

We think that the rule *nisi* for a new trial must be made absolute with costs.

SEAMAN v. PORTER.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided April 9th, 1883.)

Suit by guardian of lunatic in his own name.—Amendment on appeal.—Costs.

Is an action by, and in the name of the guardian of a lunatic, for a debt due the lunatic, the defendant did not go into his defence, contending that the action was wrongly brought, and judgment in the County Court was given for plaintiff. On appeal, the Court allowed plaintiff to amend; and, defendants contending that there was a defence on the merits, a new trial was ordered, but without costs, first, because the new trial was an indulgence to defendant, as the Court might in such a case give judgment for the plaintiff on the amended record; secondly, because, had the defendant entered on his defence in the Court below, a new trial would possibly have been rendered unnecessary by his success.

Appeal from a decision of Judge MORSE, County Court Judge for District No. 5. The action was brought by plaintiff in his own name, as guardian of a lunatic, to recover money due from the defendant to the lunatic. The judgment appealed from was in favor of the plaintiff.

Graham, Q. C., in support of appeal.—At common law the lunatic must sue in person. Our statute, *Revised Statutes*, chapter 36, section 4, authorizes the guardian to sue for the lunatic, but not in his own name. The suit must be brought in the name of the lunatic as in case of infancy. The declaration is bad in alleging money to be due and payable from the defendant to the plaintiff. Nothing except an act can enable a party to sue in his own name for the recovery of a debt due another. It is a common law right, which must be taken

away by express words. The defendant is in no sense indebted to the plaintiff; *5 H. & N.*, 700. There is not sufficient evidence of the alleged indebtedness of the defendant.

Meagher, Q. C., rested the case entirely on the statute, chapter 36, *Revised Statutes*, sections 2 and 4. Section 2 says, the Court shall appoint a guardian "with the powers and duties hereinafter specified," and one of the powers so referred to is the power to sue for and recover, &c. The powers are given entirely for the benefit of the lunatic's estate, and should be liberally construed. The guardian has the power to sue and recover. The words "sue for" were contained in the third series; the word "recover" was added in fourth series. The intention must have been to extend the powers of the guardian. He already had the power to sue. The intention must have been that he should sue and recover in his own name. If the suit were in the lunatic's name he and not the guardian would be the person who would recover. The word "recover" has a well-known legal, technical meaning; *Potter's Dwarria*, pp. 186, 199; *Maxwell on Statutes*, 318; *L. R.*, 5 Q. B., 418. If, however, the Court should decide against us, it is a case where the Court should amend. Section 8, chapter 2, Acts of 1882, enables the Court to amend. A receiver of a partnership has a right to sue in his own name. (RIGBY, J.—If you can show that it is a strong point in your favor.) I am not driven to that. The words "sue for" and "recover" must be presumed to have different meanings, and the latter word was, no doubt, added for the purpose of enlarging the powers of the guardian; *Potter's Dwarria*, 198. As to power of amendment refers to *Caldwell v. Stadacona Ins. Co.*, 2 R. & G., 300; 3 R. & G., 218.

Graham, Q. C., in reply.—The case cited was one where no one else could sue, and the statute could receive no other construction. In this case it is admitted that at common law the lunatic could have sued, and that the purpose of the statute was not to take away that right. If the legislature intended to give the guardian the right to sue in his own name, it could have said so, or have vested the debts in him. The amendment should not be granted, but plaintiff must stand by the case as printed.

THOMPSON, J., now, (April 9th, 1883,) delivered the judgment of the Court:—

The right of the guardian of the lunatic, (plaintiff,) to bring an action in his own name for the lunatic's choses in action, is doubtful, notwithstanding the language of the statute under which such guardians are appointed. I think the proceedings should be amended by substituting the lunatic as plaintiff. The following cases I consider ample authorities for that amendment: *Mills v. Scott*, L. R., 8 Q. B., 496; *Bolingbroke v. Townshend*, L. R., 8 C. P., 645; *La Banco Nazionale v. Hamburger*, 2 H. & C., 330; *Boutilier v. Knock*, 2 Old., 77, and *Battleman v. McKenzie*, do., 159. The defence, if any existed, was not entered on at the trial, but it was suggested at the argument, by defendant's counsel, that there was a defence on the merits. In consequence of the amendment, and of the contention that there is a defence, I think the case should be sent back for a new trial. The appeal should therefore be sustained and a new trial ordered. For several reasons I think there should be no costs allowed on the appeal, among these are the following:—

1st. Where the objection which the amendment cures is a technical one, as this is, and no defence has been made out, the Court may not only amend, but give judgment for the plaintiff on the amended record. A new trial, therefore, is an indulgence to the defendant, as the amendment is an indulgence to the plaintiff.

2nd. No reason has been shown why the defence was not entered on at the trial. If it had been, the appeal and new trial might have been saved by the success of the defence, or, at any rate, we should now have been able to give judgment on the whole case. The necessity for a new trial, in the interests of the defendant, therefore arises from the defendant's preference to proceed, as he has done, although his proceeding in the other way would not have prejudiced his interests.

BANK OF NOVA SCOTIA, ASSIGNEE, v. FORBES.

Before McDONALD, C. J., and JAMES, add WEATHERBE, J. J.

*(Decided April 9th, 1883.)**Action for calls.—Time for making.—Computation of intervals.—Declaration.*

AN action was brought by the plaintiff bank as assignee, under the Insolvent Act of 1875, of the Bank of Liverpool, against the defendant, for a call of 100 per cent. on his stock in the said Bank of Liverpool. The only evidence of the making of the call was a notice published in the *Gazette* of the 17th of January, and following issues, as well as in the local papers dated the 10th of January, by which a number of calls were made, payable at intervals.

Held, that the calls could not all be legally made at one time, and none could legally be made but within ten days after the expiration of six months from the suspension of payment by the bank. And further, that in computing the statutory intervals between calls the time must be reckoned exclusively of the day on which the previous call was payable.

Per WEATHERBE, J., that the insolvency of the Liverpool Bank and the insufficiency of assets should have been alleged, and further, that a certificate of the County Court Judge, after the alleged making and notice of the calls approving of the plaintiff bank so acting through their cashier, was not a sufficient compliance with section 6, ch. 31, 39 Vic.

Per McDONALD, J., that the declaration was sufficient, but the calls were irregular for the reasons above stated.

This was an action brought by the plaintiff bank, as assignee, under the Insolvent Act of 1875, of the Bank of Liverpool, against defendant, as the holder of thirty shares in the latter bank, to recover the amount of several calls made by the plaintiff, as such assignee, in respect of such shares. The cause was tried at Halifax, before JAMES, J., without a jury, who found a verdict in favor of plaintiff, to set aside which a rule was granted on the usual grounds.

Henry, Q. C., Meagher, Q. C., and Pearson, in support of rule, cite *Banking Act*, chapter 5, *Acts of 1871* and *Acts of 1876*, chapter 31. The act provides for a resolution to make the calls followed by notice. No evidence of a resolution was given. The calls are to be made at intervals of 30 days. If the notice was the resolution, the condition as to the intervals at which the calls were to be made was not complied with, but the calls were all made at once. The right to make the calls is a statutory one, and the statute must be complied with; *2 B. & Ad.*, 518; *11 U. C., C. P.*, 534. The calls were for 100 per cent. on the capital stock. There is no evidence of necessity for making calls to such a large amount. The verdict includes interest. There is no proof of insolvency.

Graham, Q. C., and Borden, contra.—Under chapter 31, section 6, of *Acts of 1876*, the plaintiff bank can act as assignee through one or more of its officers. The Bank of Liverpool was being wound up under the Insolvent Act of 1875. Under section 125 of the Act, (*Clark on Insolvency*, pp. 298, 299,) the Court can control any act of the assignee. The manner of making the calls could have been so controlled; *Thompson on Liability of Stockholders*, section 417; *91 U. S. Reports*, 59; *20 Wallace*, 650. The clause in the act in reference to making resolutions refers to cases where the resolutions are made by directors. The notice was the call; *Shaw v. Rowley*, 16 M. & W., 810; *Stephen on Joint Stock Co.'s*, 302. We admit that the English case cited applies very closely to this case, but it has since been decided that you may call for as much as you please within the limit, making it payable by instalments. Although the case has not been overruled, the principle on which it was decided has been overruled; *4 El. & E.*, 461; *Abbott on Corporations*, 35. The reason on which the English case was decided does not exist here. The directors have a discretion in certain cases under section 58 of chapter 5 of the Acts of 1871, to make calls to any amount they think necessary, without selling off property or calling in debts. Calls may be made prospectively; *7 M. & W.*, 574. The appointment of the assignee is statutable proof of the regularity of prior proceedings; *Insolvent Act of 1875*, section 144. Payment of calls under section 34 may be enforced in the same manner as unpaid stock. (WEATHERBE, J.—But you must first place yourself within section 58.) As to notice of calls cites *Stephen on Joint Stock Co.'s*, 306; *1 Kerr*, 29. Notices printed in the *Royal Gazette* are *prima facie* evidence of the original, and the contents of it; *Acts of 1876*, section 12.

Henry, Q. C., in reply.—The act cited does not dispense with proof of the truth of the statements contained in the notices. Such a construction as that it does dispense with such proof cannot be given the act unless the words make it inevitable. "Evidence of the contents of the originals" cannot mean "evidence of the truth of the contents of the originals." The act cannot, in any event, dispense with proof

of the facts required by section 34, chapter 5, Acts of 1871. If the plaintiffs fail on the double, they must equally fail on the single liability. No machinery is provided by which the assignee can make calls. Calls can only be made in case of insufficiency of assets, and then can only be made by the directors under the 34th section. The notice says that the call has been made, but there is no proof of any resolution or bye-law under which it was made. It is a fallacy to assume that the call was made by Mr. Fyshe. The directors of the Bank of Nova Scotia might have passed a resolution for calls. The appointment of Mr. Fyshe was invalid. He had no authority to make the calls until six months afterward, not having been approved by the Judge. It is incumbent upon the plaintiff to prove the condition upon which the shareholders were to be made liable.

WEATHERBE, J., now, (April 9th, 1883,) delivered judgment as follows:—

At the argument I suggested to counsel that the pleadings on both sides seemed to treat this as an action for calls under section 34 of the act which provides only for calls by directors in the ordinary way, and not to the case of an insolvent bank. Sections 57, 58, and 59 provide for cases of insolvency of the bank and calls to meet the bank's liabilities. On the argument Mr. Henry said, among other contentions, that he relied on the absence of proof of insolvency and deficiency, and he read the printed case to show that the calls amounted to \$500,000, while the liabilities amounted to little over \$100,000. In the view I take it is unnecessary to see if there is evidence of that. By section 34 the declaration is only required to contain allegations, 1st, that defendant is a stockholder; 2nd, that he is indebted to the bank in the sum to which the calls amount; 3rd, the amount and number of the calls;—whereby an action hath accrued, &c. And by the same section it is declared to be sufficient to maintain the action, 1st, to prove that defendant, at the time of the call, was a shareholder in the number of shares alleged; 2nd, to produce the bye-law or resolution of the directors making and prescribing such call, and 3rd, to prove notice thereof in conformity with such bye-law or resolution. In the case before us the shareholder is liable only

in the case of suspension of payment for 90 days, the continuance of that suspension for six months, and the insufficiency of the property and assets to meet the debts. It is provided in section 58 that the payment of a call made under that section "may be enforced in like manner as for calls on unpaid stock," namely, as in section 34. It will be admitted that in addition to the proof that defendant is a shareholder, the making and prescribing of the calls, and the notice required in section 34, to recover for calls by an assignee in insolvency, he must bring himself within section 58. The insolvency and deficiency are two things upon which such action is based. Proof of these, in the terms of the act, I should think requisite. They are the first and essential elements of this action. I cannot, therefore, understand, although the statute provides that these calls may be enforced in like manner as for calls on unpaid stock, how it is possible to succeed without declaring on them. I think they must be alleged, with all reasonable adherence to the rules governing the statement of a material allegation in a pleading; and the absence of such allegation I think fatal to the action. On the trial, my brother RIGBY, then at the Bar, strongly urged for defendant the incompetency of the Canadian Parliament to prescribe procedure for this Court in civil matters, the exclusive power in that Parliament to enact on the subject of procedure being limited by the British North America Act to criminal matters. I suppose we are concluded by authority on that point. The substance of the declaration and the nature of the proof, pure matters of procedure, are, I have said, prescribed for actions for ordinary calls on unpaid stock. The essential allegations to be incorporated in a declaration, and the proof, where the calls on shares are to make up a deficiency by an insolvent bank are not prescribed in the Act. Every material allegation required in proof to maintain the action in the ordinary case of calls is set forth. Nothing additional is provided to meet the present case. Will it be urged, on the ground that the exclusive right to adopt and prescribe procedure in civil actions in all matters exclusively within the power of the Dominion, and the neglect to provide for this case otherwise than by the general words providing for the enforcement of payment of these calls in like manner as for calls on unpaid

stock, justify the plaintiff in framing his declaration as if it were for such last-mentioned calls, and justify him also in omitting all mention of essential statements mentioned in the Act as constituting the right of action? Then, *a fortiori*, I should think he could succeed without offering any proof of such matters.

Doubtless a difficult question arose in drafting a declaration to meet the case. The statute was awkwardly framed. The difficult question was one as to the distribution of powers under the British North America Act, namely, whether a part of the procedure in a case may be Dominion procedure, and a part what may be called Provincial procedure; that is (if we may say so) mixed procedure. I have looked at all the cases touching the distribution of powers under the 91st and 92nd sections of that Act, and I think if the matter cannot be said to have been expressly decided, sufficient has been decided to preclude the propriety of independent reasoning on our part in determining that there may not only be Dominion procedure in a Provincial court, but that there may be mixed procedure or divided procedure. Defendant might have difficulty about a defence on the record to cover some of his grounds, perhaps, if the declaration had been framed in the view I take of section 58. I have not, however, thought it necessary, as no question was raised, to give much attention to that. I have no doubt the verdict could not, even in the absence of other difficulties, be sustained with this declaration. By section 57 suspension of payment for ninety days shall operate as a forfeiture of the charter, saving that it shall remain only to enable the directors or assignee to make the calls mentioned in section 58, and to wind up its business. By section 58, in the event of insufficiency of property and assets to meet the liabilities, the shareholders shall be liable on their shares, "and if any suspension in payment in full of any of the notes or liabilities of the bank *shall continue for six months* the directors shall make calls on the shareholders to the amounts they may deem necessary to pay all debts and liabilities, without waiting for the collection of debts due or the sale of assets." And "such calls shall be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which such call shall be payable ;

and any such call shall not exceed twenty per cent. on each share, and payment thereof may be enforced in like manner as for calls on unpaid stock, *and the first of such calls shall be made within ten days after the expiration of the said six months.*" A condition of the obligation of a shareholder for calls on shares to make up any deficiency in the bank to discharge its liabilities is the *continuance for six months* of suspension of payment. Suspension for ninety days renders the bank insolvent and operates as a forfeiture of the charter, but no shareholder shall be liable for calls to pay the deficiency of liabilities over assets, except in case of a continued suspension for six months of all or any of the notes or liabilities of the bank. This, no doubt, was provided to give time to appropriate the assets and property of the bank towards the discharge of the debts. And immediately following this provision it is enacted that calls may be made by the directors to the amount they may deem necessary, without waiting for the collection of debts or sale of property. Then follows the enactment providing for the intervals between the calls and the length of notice to which shareholders are entitled. The next provision is for the amount of percentage on each share to which each call shall be limited and the mode of enforcing payment. Then follow the words: "*And the first of such calls shall be made within ten days after the expiration of the said six months.*" The difference between this and an ordinary case of calls by the directors, who represent the shareholders, cannot escape observation. In using the language last quoted, the legislature was providing for a case where they had just been using words by which all the assets and property of the bank had been subjected for six months to the will and control of the creditors or the assignee who should represent them,—for six months, to convert the assets and property and appropriate them to the payment of their own claims, and then to estimate the probable deficiency. The shareholders are to be protected from calls during this period. At the expiration of this period the creditors are no longer to suffer delay, even although the property and assets are not yet reduced to money. They are to exercise a discretion, and make calls for what they may estimate as

necessary to pay the deficiency. The question possibly arose as to whether the creditors or their representative should have power to still further delay the period of making calls and winding up the business. Provision is about to be made in the next section to render liable for calls all who had transferred or conveyed their shares within a month previous to the date of suspension. Was it reasonable or necessary to limit the period within which the assignee should make the first call,—that it should be made within ten days after the expiration of the six months? Those who had transferred within a month previous to the suspension are to be liable, saving their recourse against the party to whom they had transferred. Is the assignee bound to make the call within this ten days, or may he delay, and, by delaying, prejudice the shareholder who has transferred? This is a very important question in this suit. Is this statute of limitations compulsory, or is it directory merely? I have examined the statute so carefully as not to be insensible that an argument in this important case may be suggested for the plaintiff upon certain words in the 58th section. After the words limiting the time for making the first call, as discussed, these words follow: "And any failure on the part of any shareholder liable to such call to pay the same when due shall operate a forfeiture by such shareholder of all claim in or to any part of the assets of the bank, such call and any further call thereafter being nevertheless recoverable from him as if no such forfeiture had been incurred." May it not be said that the words limiting the time for making the first call are to be read solely in relation to the subject of forfeiture in this way? If the assignee desires to create a forfeiture of the shares of any shareholder he shall be limited in giving notice for the first call in such case, and failing to do so, no forfeiture can take place thereafter. There may, however, be strong reasons why this view cannot be adopted. One thing is clear,—the calls in this case having been made (even if well made) within six months are therefore invalid. If it was absolutely necessary to make the first within ten days after the expiration of six months, the first in no case having been made within that period, all the others are invalid and never can be recovered.

One contention for defendant was that there is no proof of the making of the calls. It is quite clear that the making of a call and the giving notice thereof are two separate and distinct things. The Act provides that to maintain the action, among other things it shall be sufficient to produce the by-law or resolution of the directors making and prescribing such calls and to prove the notice thereof given in conformity with such by-law or resolution. This is the procedure provided by the Dominion Act. And it is also provided that the assignee shall for the purpose of winding up the business have all the powers of the directors. And section 63 provides that any director refusing to make or enforce or to concur in making or enforcing any call under the 58th section, (which is the section upon which this action is or should be founded,) shall be guilty of a misdemeanor and shall be personally responsible for any damages suffered by such default.

It was contended at the argument on the part of plaintiff that it would be absurd to require the cashier acting for the bank,—the assignee in this case,—or for an assignee not a corporation to do any act in making or prescribing a call, and that the giving notice, as in this case, was all that was required, and the making of the call may be dispensed with. A question arises as to whether the calls are not required to be made, even in the case of proceedings in insolvency, by the directors of the insolvent bank, or whether the making or prescribing of calls in such case may be dispensed with, or whether the provision for a bank as assignee does not impose the duty of making these calls on that corporation; and these are points upon which we offer no opinion whatever. There are two mistakes in making these calls,—first, they were all made at once; and, second, there is not the proper interval between the times of payment.

1. In *Moore v. McLaren*, 10 U. C. C. P., 538, the defendant set up that on 23rd October five calls were made, allowing the necessary period between each for payment; but it was contended successfully that the second call could not lawfully be made until after time passed for payment of the first. *Stratford Railway Company v. Stratton*, 2 B. & Ad., 518, was relied on. The words of the Act there were: "So that no

calls should be made but at the distance of two calendar months, at the least, from each other." DRAPER, C. J., in giving judgment, said: "I can draw no solid distinction between the words of this Act and those in our own. The courts say that the calls are to be made at intervals, and the committee, (in our case the directors,) are to judge from time to time of the necessity of making them. In *The Toronto Gas Company v. Russell*, 6 U. C. Q. B., 567, this case is referred to as apparently settling the question, and it is again mentioned with more direct approval in *London Gas Co. v. Campbell*, 14 U. C. Q. B., 143." *Reg. v. Londonderry, &c., Railway Company*, 13 Q. B., 998, is referred to in that case, where it was held that a call of money on shares is made in point of time when the resolution to call is passed.

2. On the other point *Buffalo and Brantford Railway Company v. Parke*, 12 U. C. Q. B., 611, was cited. According to the Act no call was to be made at a less interval than two months from the previous call. The calls were made payable by the notices on the 1st September, the 1st November, and the 1st January. The objection that the required interval of two months had not been allowed prevailed. DRAPER, J., said: "As long ago as the case of *Lester v. Garland*, 15 Ves. Jun., 248, it was said that the day of an act done and an event happening ought in all cases to be excluded rather than included. In *Robinson v. Waddington*, 13 Q. B., 753, it was held that in construing 2 *W. & M.*, chapter 5, section 2, which authorized the sale of goods distrained within five days next after the taking, the days must be calculated, as the rule now is in other cases, inclusively of the last and exclusively of the day of taking. The cases up to that time were brought under the notice of the court by counsel, and the court, (Lord DENMAN apparently with reluctance,) considered the rule to be established, as was stated in *Young v. Higgin*, 6 M. & W., 49, in which it was held that in the computation of the calendar month's notice to a justice, the day of giving the notice and the day of suing out the writ are both to be excluded. The principle is further illustrated by the case of *The Queen v. The Aberdare Canal Company*, 14 Q. B., 854, where a statute enacted that no meeting of the commissioners should be held unless notice of the time, &c., of such meeting

should be given at least sixteen days before such meeting. The notice was for a meeting on February 12th, and was dated and published in a newspaper on January 27th, and it was held insufficient. According to these authorities the day on which the previous call is payable must be excluded from the computation. The 1st of July being excluded, how can it be said there was an interval of two months between the day and time for payment? As suggested by PARKE, B., in *Young v. Higgen*, reduce the time to one day, and read the statute as requiring an interval of one day from the previous call before a subsequent one can be made; then if a call were payable on the 1st July, could a second be made for the 2nd, and yet, if not, the present case fails.

On both these grounds the plaintiff fails.

Section 6 of 39 *Victoria*, chapter 31, the Canadian statute making provision for the winding up of insolvent banks, enacts that a bank may be appointed creditors' assignee, and, in case a bank is so appointed, it may act through one or more of its principal officers, to be approved by the judge. In this case nearly all, if not all the proceedings previous to this action had been taken by Thomas Fysche, cashier of the plaintiff bank, the assignee. This certificate is produced in evidence, signed by the Judge of the County Court, to shew compliance with the sixth section:—

QUEENS, SS.

IN THE COUNTY COURT.

Insolvent Act of 1875 and amending Acts.

In the matter of the Bank of Liverpool, insolvent.

On hearing read the papers on file herein, and it appearing that the Bank of Nova Scotia, the creditors' assignee, has acted as such assignee and proposes to act as such assignee, through Thomas Fysche, its cashier, I do order that the Bank of Nova Scotia, having acted and acting in such way, be approved.

(Sgd.) W. R. DESBRISAY.

July 27th, 1880.

It will be observed that this was after the alleged making and notice of the calls and the proceedings supporting the action had been taken. This seems to be not only approval



of the officer, but an attempt to confirm proceedings taken by an officer acting without approval, and is, I should say, not within the spirit or letter of the section.

The rule *nisi* for a new trial will be made absolute, with costs.

JAMES, J., concurred.

MCDONALD, C. J.—I agree with my brother, WEATHERBE, that the verdict in this case must be set aside, on the ground that the calls for which the action is brought were not regularly made. By section 58 of the Banking Act the directors, (in this case the assignee,) may make calls, if the suspension of payment of the bank shall continue for six months. The evidence of suspension was the presentation of the checks on the part of the Dominion Government by Mr. Howe, on the 14th July, 1879. The plaintiff bank was appointed assignee on the 13th November, 1879, and the transfer to that bank by the official assignee was executed on the following day. The only evidence of "making the calls" was the advertizement or notice, dated 10th January, 1880, which appeared in the *Gazette* of January 17th, 24th and 31st; February 7th, 14th, and 21st, 1880, as well as in the local papers in Queens County. In the case of the *Queen v. Londonderry and Coleraine Railway*, 13 Q. B., 998, it was held, under a statute substantially the same as that under consideration, that a call for money on shares is made in point of time, when the resolution to call is passed, not when the notice of the call is given to the shareholders. There is no evidence of any resolution or other act of the plaintiff bank declaring or making a call, other than the notice before referred to signed "Bank of Nova Scotia per Thomas Fyshe, cashier." And this, I have said, is dated 10th January, 1880, and must be received as the act or resolution upon which the call was made, if we assume it in this respect to be legally made. The act clearly distinguishes, I think, between "making" the call and the "notice" of such call which shall be given to the shareholder before he becomes liable on the call. "Such calls shall be made at intervals of thirty days," and "upon notice to be given at least thirty days prior to the day on which such call shall be made pay-

able." It is clear, therefore, if my construction of the act be correct, that the call upon which plaintiffs rely was made before the period of six months' suspension had expired, and is, therefore, irregular and void. But the difficulties of the plaintiff bank would not be removed, did we hold that the first publication of the notice on the 17th January was the "making of the call" contemplated by the act. In *Moore v. McLaren*, 11 U. C., C. P., 534, the directors of a railway company were authorized by their Act of Incorporation, "from time to time to make such calls of money upon the respective shareholders in respect of the amount of capital subscribed or owing by them, *as they deem necessary*, and *thirty days notice at least shall be given of each call*, and no call shall exceed the prescribed amount determined in the special act, or be made at *less interval than two months from the previous call*." Our act reads, "shall be made at intervals of thirty days, and upon notice to be given thirty days at least, &c.," being in fact substantially identical in meaning, and almost so in terms, with the act mentioned. In the Ontario case the calls, as in this, were all made on the same day, by the same resolution of the directors, payable at the intervals of time required by the act, and it was held, on demurrer, that all the calls but the first were illegally made. This is, I think, a reasonable construction of the act, and is, in my opinion, applicable to the clause of the Banking Act under consideration. In this case, had the calls been made after the six months' suspension had expired, the first call might have been recovered, but, as I have said, in my opinion the call was made too soon, and the plaintiffs must fail as to all in this action. See *2 B. & Ad.*, 518; *7 M. & W.*, 574. I do not think it necessary to discuss the question raised by Mr. Justice WEATHERBE as to the sufficiency of the pleadings, further than to say that I cannot assent to the views expressed in his opinion. In my apprehension the declaration was properly framed under the clauses of the act directing the mode of enforcing calls thereunder, and, had the plaintiff been able to put the required facts in proof, he would be enabled to recover. The delay in obtaining the approval of Mr. Fyshe's appointment by the Court can only affect the regularity of proceedings taken by him before that approval was obtained,

and I abstain from giving any opinion as to the extent to which his acts would be affected, if affected at all, by such delay. A call now made by him would clearly be free from any objection on that ground. The rule for a new trial must, therefore, be made absolute; but, so far as I am personally concerned, solely on the ground of the invalidity of the calls for the reasons I have given.

THOMPSON v. ELLIS.

Before SMITH, JAMES, and WEATHERS, J. J.

(Decided April 9th, 1883.)

Rule to set aside attachment discharged.

DEFENDANT applied to set aside a writ of attachment, levy and sheriff's return on the ground that this Court had no jurisdiction because the property attached was not that of the defendant, having been conveyed to a trustee in trust for his wife some time previously. Affidavits were read in reply to shew that the trust deed was made fraudulently and in contemplation of insolvency.

The rule was discharged with costs.

On the 8th of July, A. D. 1881, plaintiff commenced proceedings against defendant as an absent or absconding debtor, under which the sheriff attached certain real estate as that of the defendant. A rule was thereupon obtained to set aside the writ of attachment, the levy, the sheriff's return, and all proceedings thereunder, or to direct the sheriff to amend his return on the following grounds:—

Because the sheriff did not attach property of defendant, and for want thereof, no agent having been summoned, the Court has no jurisdiction.

Because the levy was made on estate of others and not of defendant, and the defendant was not the owner of said estate, and the sheriff falsely returned that he attached property of defendant.

The affidavits upon which the rule was obtained made it to appear that at the time of the levy the property attached was covered by a deed of assignment in trust for the defendant's wife and for other purposes, dated August 2nd,

1875, and registered May 23rd, 1881 ; also, that the plaintiff's cause of action did not accrue until several years after the execution and delivery of the trust deed. Affidavits were adduced on behalf of the plaintiff to show that the trust deed in question was made in contemplation of insolvency. The sheriff's return was as follows :—

Under this writ I attached certain real estate of the within named defendant, on the 13th day of July, 1881, as appears by appraisement, herewith returned. I could not find said defendant and I left a copy of this writ at his last place of abode, on the above date.

JOSEPH BELL, *Sheriff*.

Wallace and Pearson in support of rule.—The sheriff's return is not sufficient to give jurisdiction to the Court. In *Ratchford v. Chipman*, Thompson's Reps., 235, an amendment of the return was required, the return being held insufficient; *Cochran v. Duncan*, Thompson's Reps., p. 80. (WEATHERBE, J.—I understand that you come here on the part of the defendant to set aside the levy on the ground that the goods levied upon were not the goods of the defendant.) Yes. If the defendant had no property the Court has no jurisdiction, and the plaintiff cannot recover a judgment. The return is not definite because it says, "as appears by the appraisement." The sheriff could not attach trust real estate. He cannot levy without appraisement. He cannot attach real estate; see section 6 of chapter 79 *Revised Statutes*. The words of the return cannot be transposed or changed for the purpose of construction.

Meagher, Q. C., contra.—The writ is good, so also is the writ of attachment. The application is really to set aside the levy or return. That is a matter that this Court cannot try upon affidavit. It is a question of title. The proper remedy is by action against the sheriff; *Hingly v. Tuttle*, (unreported.) The American decisions show that property fraudulently conveyed may be attached; 6 *Gray*, 520. Under our statute any interest of the owner of the property may be attached. Our affidavits show clearly a fraudulent intent. This intent appears also from the terms of the deed. The consideration of the deed, which conveys a large amount of property, was

one dollar. The date of the deed is 2nd of August, 1875, and it was not recorded until 23rd of May, 1881, on the eve of the defendant going into insolvency, he in the meantime having been engaged in business and having contracted large obligations. The conveyance was in trust to convey to the defendant, if he desired it, and with power to the defendant to dispose of the property by will. In the interval between the date of the deed and its registry, the defendant signed memorandums declaring the property to be his. Dakin's affidavit shows that the deed was made in contemplation of insolvency. The Court will not determine the effect of the deed on affidavits on an application of this kind; *11 C. B.*, 420. As to right of attachment see *11 Pick.*, 527. The deed having been made with fraudulent intent, it makes no difference that the debt was subsequently contracted. There is no ground of irregularity in the rule.

Wallace.—There is nothing before the Court to show fraud in this transaction. (WEATHERBE, J.—We cannot try that.) Then the Court must assume that the deed is an honest one, and that the defendant has no property that can be attached, and that the Court has, therefore, no jurisdiction. The value of the property is out of all proportion to the amount for which the attachment is made.

WEATHERBE, J., now, (April 9th, 1883,) delivered the judgment of the Court, discharging the rule *nisi* to set aside the attachment with costs.

MILLET v. LORDLY.

Before McDONALD, C. J.. and SMITH, RIGBY, and THOMPSON, JJ.

(Decided April 9th, 1883.)

Appeal allowed with costs.

APPEAL from the judgment of the County Court allowed, on the evidence, with costs, and judgment to be entered for plaintiff below with costs.

Rule to set aside judgment for defendant in an action on a promissory note, tried before M. B. DESBRISAY, Esq., County Court Judge, Lunenburg. Defendant relied on an equitable

plea setting out an agreement at the time of making the note, between defendant and the payee, that the payee was to accept a quantity of lime in payment of the note, and that the note was endorsed to plaintiff after maturity and with notice of the agreement in reference to its payment. There was also a plea of fraud in the endorsement. The Judge found in defendant's favor both on the plea of fraudulent endorsement and on the equitable plea.

Harrington, Q. C., in support of rule.—The agreement pleaded was in defeasance of the note. The only questions are whether such an agreement can be set up, and as to the evidence of fraud on which the judgment proceeded. The agreement would be no defence, even in the hands of the payee. An agreement that a note is to be renewed is not good; *Pym v. Campbell*, 6 El. & Bl., 370; *Graham v. Graham*, 2 R. & C., 269. The principle is that when once a note is made and delivered an agreement qualifying it cannot be set up.

J. J. Ritchie, contra.—Fraud having been distinctly found, very slight evidence will support it. There is such evidence. There is evidence that plaintiff admitted having taken the note, knowing the agreement as to the mode of payment, and that he assented to receive payment in that way. (THOMPSON, J.—Supposing the note could be made payable in this way, it does not appear that the defendant carried the agreement out.) Defendant gave plaintiff notice of his readiness and willingness to furnish the lime. It was plaintiff's duty, before suing, to go to the place indicated to see if the lime was there.

Harrington, Q. C., in reply.—Whatever agreement there was between Dimock, (the payee,) and Lordly, the plaintiff is not bound. The lime was to be sent to Wood's harbor and never was sent there.

MCDONALD, C. J., now, (April 9th, 1883,) delivered the judgment of the Court:—

Appeal from a judgment of the learned Judge of the County Court at Lunenburg, in favor of defendant. The action is on a promissory note made by defendant to one Dimock, and by

the latter endorsed to the plaintiff. The pleadings were the usual denials of causes of action alleged in the writ, with a plea on equitable grounds, that when the note was made Dimock, the payee, agreed to take payment in lime, and that the plaintiff knew of this agreement when the note was endorsed to him, and that the defendant was always ready and willing to pay the note according to this agreement. The learned Judge below found in favor of the defendant on two grounds:—

1st. Because the note was fraudulently obtained by plaintiff, and he was not an innocent holder.

2nd. Because plaintiff took the note, subject to the alleged agreement, to pay in lime, and, in the words of the learned Judge, “the defendant carried out, in good faith, the agreement he had made, and did all he could to secure to the plaintiff payment in the manner provided for.”

I have carefully read over the evidence more than once, because, did not my deference to the opinion of the learned Judge prevent, I should have considered the defence to this action not only unsustained by the evidence in the cause, but one that might be justly characterized as unjustifiable and impertinent. I have failed to discover a particle of evidence on which any charge of fraud against the plaintiff could be sustained and the only defence pretended to be set up by the defendant is the payment in lime, as alleged in the equitable plea. Admitting this agreement to be as stated by the defendant, although it is denied by the plaintiff, what proof is there of its fulfilment? It looks like trifling with the Court to say seriously, that the shipment to Chester, or rolling out the lime on receipt of Mr. Kaulback's letter, which “busted out and some went to Halifax and some went in different ways,”—every way but to the plaintiff—was a fulfilment of the alleged agreement to pay in lime. Assuming, as I have done, that such an agreement was made, I regret to be obliged to differ so entirely from the learned Judge who tried the cause, but I am of opinion that there is no evidence whatever to sustain the defence set up to the plaintiff's action, and that the appeal must be allowed with costs, and judgment entered for the plaintiff below with costs,

RE WINDSOR & ANNAPOLIS RAILWAY.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided April 9th, 1883.)

Ultra vires.—Bankruptcy and Insolvency.—Scheme of arrangement.

UNDER the provisions of the Act of the Legislature of Nova Scotia, chap. 104 of 1874, "to facilitate arrangements between Railway Companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted.

Held, that so much of the Act of 1874 as was necessary to the confirmation of the proposed scheme, was within the legislative authority of the Legislature of Nova Scotia.

WEATHERBE, J., dissenting from the judgment of the majority, held that the proposed scheme could not be confined chiefly on the ground that the undertaking of the company extended beyond the limits of the Province.

Henry, Q. C., having moved, on a previous day, for a confirmation of a scheme of arrangement between the Windsor & Annapolis Railway Company and its creditors, was called upon to discuss the competency of the Local Legislature to pass the Act under which the confirmation of the scheme of arrangement was sought to be obtained. The Act was passed in the Session of 1884, and reserved for the sanction of the Governor-General. That assent having been given, it was published in the acts for the following year, and appears in the Local Acts of 1875, as Chapter 104 of the Acts of 1884, (q. v.)

The following was the proposed scheme of arrangement;

SCHEME OF ARRANGEMENT

BETWEEN the WINDSOR AND ANNAPOLIS RAILWAY COMPANY and their Creditors, proposed by the Company in pursuance of the provisions of an Act of the Legislature of the Province of Nova Scotia, assented to on the 12th December, 1874, and intituled "An Act to facilitate arrangements between Railway Companies and their Creditors."

Whereas the Company were constituted and incorporated by an Act of the Legislature of Nova Scotia passed the 7th May, 1867, and (having been formed and registered under the

style of the Windsor and Annapolis Railway Company Limited as a Joint Stock Company in England, in conformity with the provisions of the Statute of the United Kingdom called "The Companies Act, 1862,") were further regulated by an Act of the Legislature of Nova Scotia, passed the 14th June, 1869 :

And whereas the creditors of the Company include the holders of certain securities of the Company respectively distinguished as A Debenture Stock, which bears interest at the rate of £6 per cent. per annum, and the issue of which to the amount of £75,000 was authorised by the provisions of a Scheme of Arrangement dated the 26th January, 1875, proposed by the Company, and subsequently duly filed, confirmed and enrolled in conformity with the provisions of the said Act of the 12th December 1874, and B Debenture Stock, also bearing interest at the rate of £6 per cent. per annum, and authorised and issued to the amount of £350,000 under the provisions of the aforesaid Scheme of Arrangement of the 26th January, 1875 :

And whereas under the provisions of the aforesaid Scheme of Arrangement the interest on the said B Debenture Stock became and is charged as a first charge on the net income of the Company, subject only to the interest on the said A Debenture Stock, and the payment of such interest may be enforced by the appointment of a Receiver :

And whereas the net income of the Company has been and is insufficient to pay the interest on the said B Debenture Stock, and the arrears now due and unpaid in respect of such interest, with the amount to become due to the 1st October, 1882, will amount to the sum of £70,000, and the accumulation of such arrears is injurious to the interests of the Company and their creditors and shareholders :

And whereas the amount of the share capital of the Company as at present authorised is £500,000, in shares of £20 each, of which there have been issued 15,075 shares, amounting to £301,500, all of which are fully paid up :

And whereas, having regard to the circumstances aforesaid, it will be for the advantage of the Company and their said creditors and shareholders that the liabilities and the existing capital of the Company as to so much of their loan capital as consists of the said B Debenture Stock, and as to their existing

share capital, shall be re-adjusted in manner hereinafter provided so as to effect a new security and provision for the said holders of the said B Debenture Stock, which shall be more beneficial to them and also to the Company and their shareholders than the existing security :

Now Therefore the Company in pursuance of the provisions of the said Act of the Legislature of Nova Scotia, intituled "An Act to facilitate arrangements between "Railway Companies and their creditors," have prepared and propose the following Scheme of Arrangement as between them and their creditors :

1. As from the date of the filing of this Scheme (but subject to the confirmation and enrolment thereof in due course,) in pursuance of the said Act, the said B Debenture Stock for £350,000, and the securities, rights and interests theretofore subsisting in respect thereof, including all arrears of interest thereon and all certificates of indebtedness issued by the Company in respect of such arrears, shall become and be abrogated and determined, and in lieu thereof the holders of such B Debenture Stock shall be entitled to such new Debenture Stock and to such Preference Shares in the Company as hereinafter provided for.

2. Immediately upon this Scheme being enrolled there shall be created and in due course thereafter issued by the Directors of the Company new B Debenture Stock to the amount of £200,000 (being the amount of 50 per cent. of the capital of the existing B Debenture Stock, and about 35 per cent. of the arrears of interest thereon as aforesaid) which shall bear interest as from the 1st October, 1882, after the rate of £4 per cent. per annum, and be payable half-yearly on the 1st April and 1st October.

3. The new B Debenture Stock shall be a first charge upon the Undertaking and Rolling Stock of the Company (including their right and interest in any line of Railway other than their own line which they are or may become entitled to, by lease or to work, under any agreement or running powers) subject only to the said A Debenture Stock, and the interest on such new B Debenture Stock shall be the first charge on the net income of the Company accruing from

the 1st October, 1882, subject only to the payment thereof of the interest on the A Debenture Stock. Provided always that the said charge in respect of the interest of the new B Debenture Stock may be enforced, (as if the same were interest on Ordinary Debentures of the Company,) by means of a Receiver of such net income on behalf of the holders of the new B Debenture Stock, in case the interest thereon shall not be punctually paid, or in case the possession by the Company of their Railways and Undertaking, or the receipt of the revenues thereof may be interfered with or endangered so as to prejudice or endanger the security of the holders of the new B Debenture Stock.

4. Immediately upon this scheme being enrolled there shall be created and in due course issued as hereinafter provided, Preference Shares of the Company to the amount of £220,500 (being the amount of 50 per cent. of the capital of the existing B Debenture Stock, and of 65 per cent. of the arrears of interest thereon), and there shall also be issued as hereinafter provided new Ordinary Shares of the Company to the amount of £100,500.

5. The said Preference Shares shall bear and the holders thereof shall be entitled to dividend on the amount thereof after the rate of £5 per cent. per annum, as from the 1st October, 1882, payable half-yearly out of the net income of each current year after that date, in preference and priority to any dividend in respect of any of the Ordinary Share Capital of the Company, but so that the deficiency of any year shall not be paid or made good out of the income of any succeeding year, and upon any return or repayment of Share Capital by the Company the amounts of the said Preference Shares shall be paid in preference and priority to any of the Ordinary Share Capital. The holders of the said Preference Shares shall be entitled to one vote in respect of every such share held by them respectively.

6. The said Preference Shares and new Ordinary Shares shall be issued as fully paid up shares of £20 each, and shall be allotted and issued rateably (as to the Preference Shares) to and amongst the registered holders of the existing B Debenture Stock, and (as to the new Ordinary Shares) to and amongst the holders of the existing shares of the Company,

in proportion to their respective holdings of such Debenture Stock and Shares respectively. In order to admit of such proportionate allotments being exactly made, the Directors may, as to a sufficient number of the said Preference and new Ordinary Shares respectively, make such arrangements for the issue of scrip certificates, subdivided shares or stock, or otherwise as may be requisite or convenient for that purpose.

7. Immediately upon such new Ordinary Shares being allotted as aforesaid to the said shareholders of the Company, the shares theretofore held by them respectively, and the certificates thereof and all entries in the Registers of the Company with respect thereto shall be cancelled.

8. From and after the next Ordinary General Meeting of the Company after the enrolment of this Scheme the additional Directors of the Company heretofore appointed and acting under the provisions of the aforesaid Scheme of the 26th January, 1875, as B Debenture Stock Directors shall cease to be or to act as such Directors, and no new Directors shall be appointed in their place or otherwise as B Debenture Stock Directors.

Henry, Q. C.—As to effect of Insolvent Laws cites *Bouvier's Law Dict.* In the United States the subjects of bankruptcy and insolvency are regarded as exclusively under the power of Congress. A State Legislature is disabled from passing laws impairing the obligation of contracts. Cites *L. R.*, 6 P. C., App. 36, 37. The view is sanctioned by this case that an act which does not provide for the distribution of the assets of a concern is not an insolvent or bankrupt act. The act here falls short of the leading provisions of a bankrupt act, viz., the cession of the property of the bankrupt and the division of his goods among his creditors. The matter is *prima facie* within the power of the Local Legislature, and must be so construed, unless controlled by the principle in regard to bankruptcy. The act we are discussing falls short of acts which must be considered to be acts on the subjects of bankruptcy and insolvency, as the terms must be understood to have been used by the British North America Act. The very object of the act is to avert insolvency.

The COURT, now, (April 9th, 1883,) delivered judgment :

MCDONALD, C. J.—The Windsor & Annapolis Railway Company was incorporated by a provisional act passed on the 7th day of May, 1867, “ for the purpose of constructing, under the authority, powers, and provisions of the said Act, and also of the Act chap 70 of the *Revised Statutes*, as far as the same shall be applicable, and also the said contract, a railway from Windsor to Annapolis, for the conveyance and transportation of Her Majesty’s, or her successors’, mails and passengers, freight, and generally, the transaction of all business connected therewith, or necessarily or usually performed on or by railways, and for constructing such wharves, docks, bridges, or piers as may be necessary for the same.” By section 7 of the same act the company was authorized * * “ to make such connection as they may think proper, with other railway or steamboat companies within or without the Province, either by leasing their road to other corporation or corporations, on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway companies or company, upon such terms as may be agreed upon to make, execute, and deliver, good and sufficient mortgage deed or deeds of their road, and all its branches, to such private person or company within or without this Province, as they may think the interests of the stockholders requires.” By chapter 23 of the Local Acts of 1869, the Act of Incorporation of the “ Windsor & Annapolis Railway Company ” was amended by incorporating with that act articles of association entered into on the 26th day of February, 1867, by and between the then shareholders of the company incorporated and registered in England as the “ Windsor & Annapolis Railway Company, limited.” And exacting that “ the company may do such other acts as are authorized by the said articles of association.” Among other provisions of the articles thus incorporated into the Act of 1867, was one authorizing the company “ to acquire by purchase or otherwise, a concession or concessions for any branch, extension, or other railway or railways to be situate in the said Province, or any other Province or county adjacent or near thereto, * * * or the purchasing, leasing, or working of any

such branch, extension, or other railway from or under the Government of Nova Scotia or any other Government or private person or persons, &c." Under the powers conferred by the Act of 1867, the Windsor & Annapolis Railway Company constructed the railway from Windsor to Annapolis, as provided for in that act, and have continued to operate the same since its completion. In 1874 the Legislature of Nova Scotia passed an Act, chap. 104, entitled "an Act to facilitate arrangements between railway companies and their creditors," and the meaning of the word company in the act is declared to be "any railway company constituted by any act of the Legislature of Nova Scotia." In accordance with the provisions of this act the Windsor & Annapolis Railway Company proposed a scheme of arrangement which was filed and confirmed by an order or rule of the Court on the 26th of January, A. D. 1875, and in September, A. D. 1882, Mr. Henry, on behalf of the company, proposed a further or amended scheme of arrangement, which he moved the Court to confirm, in terms of the act. Some of my brethren entertaining doubts whether the Act of 1874 was within the competency of the Local Legislature to enact, Mr. Henry was directed to speak to that point, which he did, on the 20th of December last, and again on the 17th of March last; but the effect of the amending Act of 1869, if any, or the power of the Local Legislature since the Union to confer upon the company the larger powers referred to in the articles of association set forth in the act, were not discussed. It is admitted, I believe, that it was fully competent to the Legislature of Nova Scotia to pass the Act of 1867, and to confer upon the company all the powers and privileges specified in the act; and the Windsor & Annapolis Railway Company has not, in terms of subsection 92 of the British North America Act, been declared to be a work for the general advantage of Canada. It does not appear that the company have extended their operations beyond the Province of Nova Scotia, or that they have done, or are now doing more, than operating the road between Windsor and Annapolis under the terms of their charter.

The majority of the Court are of opinion that the rule to confirm this scheme, in terms of the act, should pass.

RIGBY, J.—At first I was doubtful whether this was a scheme that came within the Statute of 1874. I thought the Statute of 1874 was within the competency of the Local Legislature, but that it would not cover the scheme intended to provide for a composition between the railway and their creditors. After hearing Mr. Henry in relation to this matter, I was of opinion that it would come within that sub-section of the exclusive powers of the Provincial Legislature which related to property and civil rights in the Province, unless overborne by a provision in section 91 that gave the Dominion Parliament power over bankruptcy and insolvency. At first I was inclined to think it did do so; that it was merely a scheme by which the Windsor & Annapolis Railway Company provided that their creditors should accept a less sum in payment of their liabilities than they were entitled to. But after Judge THOMPSON had drawn my attention to the real meaning of scheme, I changed my mind on that point and became convinced, so far as the documents contained the necessary information, that, instead of being an arrangement by which the creditors were compelled to take less than they were entitled to, it was merely changing the form of the stock and providing that stockholders should take one kind of stock in place of another. It did not appear that there was any liability to those stockholders for arrears of interest or any other liability that was being compromised by this scheme. Therefore, my present conclusion is, that this is not a matter which comes within the exclusive competency of the Dominion Legislature, viz., bankruptcy and insolvency, but is a scheme within the Act of 1874, so far as that act came within the competency of the Local Legislature. The Windsor & Annapolis Railway Company being a Provincial incorporation, and the property being within the Province, I consider the stock referred to in the scheme to be property over which the Provincial Legislature had exclusive jurisdiction.

WEATHERBE, J.—This is an application under Chap. 104, 37 Vic., Acts of the Legislature of Nova Scotia, empowering a portion of the members of railway companies to make a scheme of arrangement between the company and their creditors to stay actions and other proceedings against the

company, and, I suppose, to reduce the claims of the creditors or extinguish them, or at any rate, delay payment. We are petitioned to make an order, provided by the act, to confirm a scheme of the Windsor & Annapolis Railway Company, incorporated under Chap. 36, 30 Vic., amended by Chap. 23, 32 Vic., of the Acts of the Nova Scotia Legislature, the first of which was passed previous to the B. N. A. Act, the other afterwards. The Windsor & Annapolis Railway Act of 1867 authorizes the company, in addition to the right to build a railway from Windsor to Annapolis, to make connections with other railway or steamboat companies within *or without the Province*, and they may lease the road to other corporations, or consolidate their stock with other railway companies and convey their road by way of mortgage or other conveyance, to corporations within or without the Province. Power given to the company under section 8 of the act to purchase or lease any line or lines of railroads, and to hold and use such railways and sell and sub-lease, or in any way convey the same, does not seem to be limited to this Province, but is given in general terms. This act also incorporates a contract with the Nova Scotia Government, and secures to the company rights in a railway which belonged to the Province, and which has become the property of Canada by the British North America Act. The company is incorporated under the Joint Stock Companies' Act of England, and, by the Nova Scotia Act of 1869, amending the Act of 1867, the articles of association are incorporated and made part of the incorporation. The head office and the board are in London. All that is required is that a solicitor should be in this Province, upon whom service can be had. All or nearly all the shareholders and creditors are beyond the jurisdiction of this Court. I will assume that the proposed scheme may be of advantage to the present creditors and shareholders, but if we make an order upon which the improvement of the position of the present shareholders and creditors ensues upon the strength of the change, and they should sell or transfer their interests, unless our order should be valid, it might turn out disastrous to other persons hereafter. As the proceeding is *ex parte*, the question is one of importance, and, as I am so unfortunate as to differ with the rest of the Court, I, with diffidence, take

occasion to state the reasons which prevent me from joining my brethren in making any order whatever, though I understand the order to be granted is not the one asked for. The scheme is based on an order already obtained by virtue of the act under which the application is made. The scheme, as it stands, is one which recites the incorporation in England and deals with the creditors under that incorporation. I think we can get but little assistance from decided cases. In *The Citizens Insurance Company v. Parsons*, it was contended that the right to require specific conditions in all insurance contracts, whether entered into with a company incorporated within or without the Province, was not a provincial matter, but was a subject for exclusive Dominion Legislative jurisdiction. It was held that this right to legislate fell within article 13 of section 92, "Property and civil rights within the Province," which words are to be taken in their largest sense. If this matter does not fall within the provisions of section 92 of that act the application fails. If it so falls the petition will still be refused if there is anything in section 91 covering the matter so as to override the provisions of section 92. The only contention made by petitioner's counsel was that the matter was one of "property and civil rights," under article 13 of section 92. A majority of the Court were at first opposed to the application, and, after we had all given much attention to the matter, the petitioner was again heard. No doubt, in one sense, this is a question of property and civil rights, namely, the railway property of the company and their rights in the Government Railway. There are few questions of trade and commerce, navigation and shipping, banking, bills of exchange and promissory notes and bankruptcy and insolvency that do not involve also questions of property and civil rights, and yet they are clearly exclusively within the legislative power of Canada so as to override the provisions as to property and civil rights. It must be admitted that, respecting all purely provincial railways, incorporated within the Province, in questions arising as to the property and civil rights of the shareholders, the matter would fall within article 13, because that relates to property and civil rights within the Province, subject, even then, to be overborne by section 91; but, I doubt whether it can be said that the

property and rights of a railway authorized by an act to extend beyond the Province or connect with other railway or steamboat lines without the Province, falls within section 13; that is not, I think, the true construction of section 13. It was not attempted by counsel to bring this matter within article 10, (a) and, I think, even if the matter in question falls within article 13, the language of section 10 shews that this matter embraces an undertaking connecting the Province with another province, or, at any rate, extending beyond the limits of the Province. In *Dow v. Black*, 6 P. C., App. 272, a question arose respecting a railway company incorporated before Confederation, the same year, I think, that the Windsor & Annapolis Railway Company was incorporated, with language very much like this, authorizing the company to make a railway to the frontier of the State of Maine and combine with other roads. The Privy Council would not determine whether this was an act that could have been passed by the Province after Confederation, but it seemed to have been admitted that no such act could have passed connecting two provinces. An act of the Province, after Confederation, to tax a district of the Province to assist the road, was held to fall exclusively within article 2 of section 92, "Direct taxation within the Province." In *Burgoin v. The Montreal, Ottawa and Occidental Railway Company*, a railway was declared under (c.) article 10, section 92, taken with section 91, of the British North America Act to be for the benefit of Canada, and the transfer of that road to the Province was confirmed by an Act of the Province. It was held that that Provincial Act of Quebec was *ultra vires* in the case of an execution against the original owner, levied on the property, and that it required a Dominion Act to transfer or confirm the transfer of the railway property in question to the Province. The undertaking is clearly on the face of it a joint stock share company formed in London, with the head office there, for construction of railways and tramways in the colonies, and for leasing the same, connecting with other railway or steamboat lines, home or foreign, to consolidate their stock with other companies, and to buy and sell railways or tramways and mortgage the same within or without the Province. It may be said they have, as yet, only acquired property in the Province. That

they have not disclosed. In *L'Union St. Jaque de Montreal v. Belisle*, on the face of the impeached act it is admitted that the plaintiff society was in a state of extreme financial embarrassment, and no doubt the act was passed to relieve them from that position. Lord SELBOURNE, in giving the judgment of the Privy Council, said the matter was one of a merely local or private nature *in the Province*, "because it relates to a benevolent or benefit society, incorporated in the City of Montreal, which appears to consist of members who would be subject *prima facie* to the control of the Provincial Legislature," and the act, he said, dealt with the affairs of that particular society. "Clearly," he continues, "this matter is private, clearly it is local, (so far as locality is to be considered,) because it is in the Province and in the City of Montreal, and unless, therefore, the general effect of that head of section 92 is, for this purpose, qualified by something in section 91, it is within the exclusive competency of the Province." About that part of this binding decision there is no difficulty. The difficulty arises as to the application of what is laid down about bankruptcy and insolvency. In that case the act relieving the plaintiff from the extreme financial embarrassment was held not to fall within the subject of bankruptcy and insolvency, and the onus was said to be on the party disputing the validity of the act, and that there was no indication of anything being contemplated in section 91, except general legislation, and also that bankruptcy and insolvency are defined to comprehend provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including the conditions in which that law is to be brought into operation. It is further said, (1) There is no such general law passed by the Dominion concerning the particular association. (2) The possibility of such a law is no reason why the power of the Province over this local and private association should be in abeyance or taken away. (3) Legislation dealing with the financial embarrassment of the society, and preventing its ruin, does not bring the matter within the category of insolvency. (4) The tendency of such legislation is to keep the society out of insolvency. (5) The act does not terminate the association.

(6) It does not propose a final distribution of its assets on the footing of bankruptcy or insolvency. (7) It does not wind it up. (8) It contemplates its going on, and possibly recovering its prosperity.

The Judicial Committee of the Privy Council, for these reasons, held that this was not an act relating to bankruptcy and insolvency. These propositions should be applied to this Windsor & Annapolis Railway Company: (1) There is no Dominion law of insolvency covering this company. (2) the possibility of such a law is no reason for depriving this company of the benefit of this act. (3) An act dealing with the embarrassment of this company and preventing its ruin, does not fall within the category of insolvency. (4) The tendency and effect of applying this legislation is to keep the company out of insolvency. (5) The scheme does not terminate the association. (6) It does not propose a final distribution of its assets. (7) It does not wind it up. (8) It contemplates its going on and possibly recovering its prosperity.

If I could follow this mode of reasoning, or if I could see that this reasoning was necessary to decide the question in hand, or intended to operate beyond the question under discussion, I must admit that I should consider myself concluded by authority. As it is, I must certainly, not without much doubt in consequence of the language of the judgment just referred to, say that I think the decision there given was not intended, and would not be held to cover the case now in hand. On the contrary, I am led to think the subject matter of the act in question falls within article 21 of section 91 of the British North America Act. Holding these views, I could not make up my mind to state the conclusion at which I arrived, without giving the reasons.

THOMPSON, J.—I concur with the majority of the Court. It is impossible to hold that the Act of 1874 was beyond the power of the Legislature of Nova Scotia, because it is susceptible of a limited construction, and, under that limited construction it can be made applicable to a set of cases which would fall within the limited construction. I regard the application to us as one in which it is sought to affect property and civil rights within this Province, of certain stockholders

of the Windsor & Annapolis Railway Company, and to affect no other rights whatever. The application seems to me to entirely avoid the subjects of bankruptcy and insolvency. The construction under which the rule can be passed entirely avoids the subject; it does not deal with the rights of any person or body of persons who stand in the relation of creditors of this company. The case from Quebec, cited from the Privy Council, and which is referred to by Judge RIGBY, was a case in which, possibly, a great deal more difficulty might be met in removing it from the category of subjects relating to insolvency, because, there, the right of action and the contract itself were modified, and, in fact, the right of action taken away. With respect to these shareholders, they have no debt, no claim, no right of action, although the company is \$70,000 in arrear to them. They have no right of action in this or any Court in any part of the world, in respect of it, so far as this company incorporated in Nova Scotia is concerned. They can simply apply for a Receiver. Now, the scheme proposes that they give up that right and take other rights in lieu of it; therefore, it is not a question of bankruptcy or insolvency purely, but one of property and civil rights. We are able to give the rule in this case, notwithstanding the company professed to have larger powers than are usually conferred upon railway companies in the Province, because it was incorporated at the time when it was within the power of the Legislature to go beyond the Province. It then gave its constituent organization to the company, and the company stand in no different position from an individual in respect of property and civil rights. Foreign Courts will not at all be affected by any decision we come to. I concur, to some extent, with Judge WEATHERBE, as regards the difficulty if we had such a scheme before us as we had in the previous application. This does not, however, deal with creditors, or take away any right of action, nor does it put the company into insolvency. I do not know that it is necessary to express any opinion as to how far we could confirm the scheme previously before us, but as to the present scheme, I agree with the majority, notwithstanding that it is based to some extent on the former scheme. If the former scheme were not *res judicata*, then the order we now pass takes

away no right whatever, because it simply changes the right which arises if that former scheme is one which was valid and binding between the parties. If not valid and binding, then the parties to be affected by this rule have no rights whatever. With regard to the Dominion Parliament having legislated upon this company, I understand that the validity of the acts was sustained in consequence of its being held that the acts did not relate to this company at all.

MCKAY v. MOORE ET AL.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided April 9th, 1883.)

Contract by public agents.—Individual liability for breach.—Board of Health.—Special finding set aside.

At a meeting of the inhabitants of Sydney defendants were appointed a committee to act as a Board of Health, in consequence of an outbreak of smallpox. They were subsequently appointed as such Board by the Lieutenant-Governor, under Chapter 29, R. S., (4th Series,) and made a contract with plaintiff for medical services while the disease should continue in the place, at a fixed rate *per diem*. They dispensed with his services before the disease had been eradicated. In an action for wrongful dismissal, the jury found that plaintiff did not know, at the time of the contract, of the appointment by the Lieutenant-Governor of the defendants to be a Board of Health, and that the contract was made with them in their individual capacity.

Held, that the action was *ex contractu*, that defendants, whether acting *intra vires* or *ultra vires* of their authority as a Board of Health, were to be regarded as public agents, not individually liable on the contract which they had made on behalf of the public, and that the findings of the jury were not warranted by evidence that the contract was made by defendants with plaintiff in the ordinary way in which a contract would be made by public agents. Verdict for plaintiff set aside.

This was an action brought by plaintiff against defendants, the Board of Health for the District of North Sydney, in the Island of Cape Breton, to recover money alleged to be payable by the defendants to the plaintiff for the work, care and attendance of the plaintiff by him done and bestowed as a physician, and otherwise for the defendants at their request, and for medicines and materials and necessary things provided and supplied by the plaintiff for the defendants at their request.

And also for money payable by the defendants to the plaintiff for the work and labor, care, diligence and attend-

ance of the plaintiff by him done, performed and bestowed as a physician, apothecary, and otherwise for the defendants in and about the healing and curing, and endeavoring to heal and cure, certain persons in District No. 4, at North Sydney, aforesaid, of the smallpox and of divers diseases, disorders and maladies under which they respectively labored, and for divers medicines and other necessary things found and provided, administered and applied by the plaintiff for the said persons at North Sydney, aforesaid, and at the special instance, retainer and request of defendants.

Plaintiff's writ also contained the following counts :—

4. And the plaintiff also says that the defendants contracted and agreed with the plaintiff that if he would, as a physician, heal and cure, or endeavour to heal and cure, and give his care and attention to certain persons then ill, and who might thereafter during the then season in District No. 4, become ill of the disease of smallpox, that they, the defendants, would pay the plaintiff for his services at the rate of six dollars and fifty cents per day, that the plaintiff agreed thereto and gave up his other practice to attend on said persons, and healed and cured, and endeavored to heal and cure said patients, and gave them his care and attention, and was willing to continue his services, yet the defendants ignored the said agreement, and whilst the said disease was prevalent during the season aforesaid in No. 4 District, discharged plaintiff, and he has suffered special damage, as his patients and others requiring his services would not, for a long period of time, employ him from dread of infection and contagion from said disease through him, and during such period of time the defendants employed other physicians to attend on the said smallpox patients.

5. And plaintiff also says that the defendants contracted and agreed with the plaintiff that if he would, as a physician, heal and cure, or endeavor to heal and cure, and give his care and attention to certain persons then ill, and who might thereafter during the then season in District No. 4 become ill of the disease of smallpox, that they, the defendants, would pay the plaintiff for his services at the rate of six dollars and fifty cents per day, that the plaintiff agreed thereto and gave up his other practice to attend on said persons, and healed and

cured, and endeavored to heal and cure, said patients, and gave them his care and attention, and was willing to continue his services, yet the defendants ignored the said agreement, and whilst persons were sick of the smallpox during the said season in said district, the defendants discharged plaintiff and retained and employed other physicians and surgeons, and it was thereby indicated, and it was so understood and believed by many persons who would likely employ plaintiff, that plaintiff improperly cared for and attended said smallpox patients, and was not a competent physician, and plaintiff thereby suffered and sustained special damage to his professional status and position as such physician, and has been deprived of patients and practice in his profession.

Defendants paid into Court a sum of money which they said was sufficient to satisfy plaintiff's claim and, as to the balance, pleaded, among others, the following plea:—

And for a ninth plea to said fourth count the defendants say that they were constituted and appointed a board of health for the district of North Sydney, in which place the disease of smallpox was at that time prevalent; that they appointed the plaintiff the physician and surgeon to have the care and attention of those afflicted with said disease, and he assumed the duties of said position; that the rate of mortality among those afflicted being great, and complaints having been made of the want of skill and attention of the plaintiff, the defendants appointed another physician, the plaintiff's senior in his profession, to act with plaintiff as consulting physician and surgeon, but the plaintiff refused to act or consult with said physician, and ceased to attend the persons ill or afflicted with said disease, and disregarded the orders and requests of said physician and of the defendants, whereupon the defendants were obliged to employ other physicians to attend said persons suffering from said disease, which is the alleged breach of contract complained of by plaintiff, and his discharge also complained of in said count, nor did the plaintiff suffer special damage from the causes alleged in said count.

The cause was tried at Sydney in August, 1882, before RIGBY, J., who charged the jury as follows:—

I told the jury that the only questions which I would

submit for their consideration arose under the 4th and 5th counts of plaintiff's declaration; that I did not consider that the contract alleged in the 3rd count had been proved, and the sum to which plaintiff was entitled under the 1st and 2nd counts was covered, as was admitted by his counsel, by the sum paid into Court; that whether the Governor-in-Council had power to appoint a Board of Health, and whether, assuming no such power to exist, the contract was not too uncertain to enable plaintiff to recover upon it the damages claimed, were questions of law that they need not consider; the defence set up in the 9th plea had not been made out; that I held defendant would have a right to dismiss plaintiff for refusing to consult with Dr. McPherson, but there was no evidence that they did so. They subsequently continued to employ him, and when they did dismiss him gave as the only reason for doing so "there being no necessity for two doctors to attend the smallpox patients at present," which was no justification for his dismissal if they had originally contracted to continue him in their employ.

That if the contract declared upon in the 4th and 5th counts was entered into with defendants in their representative capacity as a Board of Health, plaintiff could not recover in this action, which was against defendants personally; that in considering the questions which I was about to submit to them, if they were of opinion that plaintiff knew that defendants had been appointed a Board of Health when he contracted with them, and that they were acting as such at the time, it would be assumed that he contracted with them in their capacity as such.

The learned Judge drew the attention of the jury to the testimony on this point and to the documents, which bore internal evidence of the contract having been so made, but in regard to which plaintiff had explained that he had always addressed them as a Board of Health, because they called themselves so, and he knew that they were negotiating to be appointed as such, but did not know that they had ever been actually appointed.

He then requested them to answer the two following questions:—

1. When plaintiff made the contract with defendants did he know that they had been appointed as a board of health by the Governor-in-Council ?

2. Was the contract made with them as such board of health or in their individual capacity ?

To the latter question the jury replied "in their individual capacity," and answered the former in the negative.

The learned Judge then instructed the jury to find a verdict for defendants upon the first three counts, and for plaintiff upon the 4th and 5th, informing them that the money paid into Court covered plaintiff's actual services up to March 12th, 1880, and the measure of damages would be an allowance of \$6.50 a day from the latter date to May 5th, on which date Mr. Hearn had proved Dr. McPherson's services had terminated. They accordingly found a verdict for plaintiff for \$351¹⁰/₁₀₀.

A rule was granted to set aside the verdict as against law and evidence, and for misdirection, which was argued January 26th, by *Graham, Q. C.*, in support of rule and *Sedgewick, Q. C.*, contra.

THOMPSON, J., now, (April 9th, 1883,) delivered the judgment of the Court :—

On the 5th of February, 1880, smallpox broke out in North Sydney, and the inhabitants met and appointed the defendants a committee to take steps to prevent the spread of the disease, all the defendants being present excepting Christie and Brown, who subsequently acted with the others. On the 16th of February the defendants were appointed by the Lieutenant-Governor-in-Council "to be a Board of Health for that district. On February 19th three of defendants who had been acting as a "managing committee," asked plaintiff what he "would take to attend upon the smallpox patients, such as were and might come under the jurisdiction of the Board." He replied, "\$200 a month." On the same day the whole Board met and the committee reported on this and another offer, and the following resolution was come to :—

"Moved by J. Vooght, seconded by J. W. Ingraham, that a doctor be secured and retained by the Board to attend upon all the smallpox patients who are and may be the present season

be attacked with the disease of smallpox in District No. 4, under the Board's jurisdiction, at the rate of \$6.50 per day."

The Board then adjourned but met again the same day, when these proceedings took place:—

"Dr. McKay being present, agreed to take charge of the smallpox patients at the rate of \$6.50 per day under the conditions of the resolution passed by the Board this morning, all medicines and drugs to be provided by the Board, and his services to the Board thereunder to commence from the 18th of February, instant."

* * * * *

"It was moved by J. Vooght, seconded by G. S. Brown—'That Dr. McKay be engaged for such purpose, and under such conditions.' Carried."

Plaintiff continued performing the duties devolving on him under this engagement until March 12th. On March 5th Dr. McPherson also had been engaged, and plaintiff had been requested to consult with him daily, which plaintiff declined to do in these words:—

"I will not act in pursuance with the enclosed resolution, but I will continue my services to the Board as I have heretofore done, and consult Dr. McPherson only on such occasions as I would like to ascertain his opinion respecting the condition and treatment of such patient or patients as may happen to come under my care from time to time. I mean ascertaining his opinion in serious cases only."

On March 12th the Board passed the resolution and sent to the plaintiff the notification expressed in the following letter of the Secretary:—

"N. SYDNEY, March 12, 1880.

To N. E. MCKAY, M. D.,

North Sydney, C. B.:

SIR,—I am directed by the Board of Health to inform you that they feel called upon, in view of there being no necessity for two doctors to attend the smallpox patients at present, they have passed the following resolution, viz. :—

"*Resolved*, That this Board courteously dispense with the services of Dr. N. E. McKay upon the smallpox patients from this date, as they consider the expense of two doctors unneces-

sary for the present; and that the services of Dr. McPherson be retained till further notified."

You will therefore consider yourself relieved from further attendance on behalf of this Board and upon such patients from this date.

Yours,

J. H. HEARN.

Plaintiff states in his evidence that if his services had not been dispensed with he would have been in attendance until between the 10th and 20th of May, and he sues 1st, for drugs and medicines actually supplied. 2nd, for services actually rendered, and 3rd, for the remuneration which he would have been entitled to had he continued to serve until the eradication of the disease at that place, claiming that he was improperly dismissed from the service of the Board. The two first claims mentioned have been met by a payment into Court. For the third the jury awarded plaintiff \$351, being \$6.50 per day from March 12th to May 5th. They expressly found, in answer to questions put to them by the Judge, that when plaintiff made the contract with defendants he did not know that they had been appointed a Board of Health by the Governor-in-Council, and that the contract had been made with defendants in their individual capacity, and not as such Board of Health. The statute under which defendants appear to have been appointed and to have been acting is chapter 29, R. S., (4th Series,) the 12th section of which provides that "the reasonable expenses" * * "to be incurred by any Board of Health, in carrying out the provisions of this chapter, shall be a county or district or city charge, and shall be assessed," &c., &c. It is quite apparent, from the evidence, that from first to last, both before the appointment by the Government and afterwards, the defendants were acting, not on their own behalf, or otherwise than as public agents, and before they incurred any liability to the plaintiff, they had been regularly commissioned a Board of Health, and were in such a position that the credit of the municipality should be pledged for all the reasonable expenses, (such as these were,) which they should incur. The remedy of the plaintiff, primarily, then, was against the municipality, and our view of that point is not affected by the contention of plaintiff's

counsel that this is virtually an action for wrongful dismissal. It is an action *ex contractu*, and the gist of it is that a valid contract was made with plaintiff at a certain rate for a certain period, and that the attempt to terminate it on March 12th was nugatory. It may be assumed that even though defendants were thus acting as public agents, and with statutory provision for the liabilities which they should incur, they might have made themselves expressly liable in their private capacities, and the jury have found that they did so; but, before we can sustain such a finding we must see that there is some evidence to warrant it, some evidence other than the evidence that they made just such a contract as a regularly constituted Board of Health would have made, acting on behalf of, and at the instance of the government, and with a view solely to the municipality, or the government, being liable for their contracts. In the language of the authorities, (see *Story on Ag.*, sec. 306,) the proofs ought to be exceedingly cogent and clear in order to create such personal responsibility in a known public agent. We do not find, however, any such testimony as would sustain either of the special findings of the jury. The plaintiff's evidence on these points is as follows: He was present at the public meeting at which defendants were appointed a committee. Referring to a period three days after this committee had been, by the action of the Governor-in-Council, erected into a Board of Health, he says: "On the 19th February Messrs. MacKay, Phoran and Hearn waited on me; asked we what I would take to attend upon the small-pox patients, such as were and might come under the jurisdiction of 'the board,' as they called themselves." On the same day he is asked if he will accept an engagement on the terms stated in the resolution first quoted, which terms are "that a doctor be secured and retained *by the board*" to attend patients "under the Board's jurisdiction," at \$6.50 per day. He replied that he would, and he puts in evidence the second minute quoted above, which established that "his services *to the Board*" were to commence from the 18th February. This made the contract, which the jury declare was made with defendants, not as a Board of Health, but in their individual capacity. Again the plaintiff says:—"Defendants called themselves a Board of Health; I never

knew that defendants had been constituted a Board of Health until last October, but I knew they were negotiating to be appointed a Board of Health during the time of the smallpox ; I mean by that during the time they were negotiating with me ; at the first meeting of citizens they were talking about there being no Board of Health, and how to have one formed." * * * "The patient I charged for refused to come in under the Board of Health ; they called themselves a Board of Health, and I treated them as they called themselves." * * "They never notified me they had been appointed a Board of Health, though I knew they were negotiating for being so appointed." The defendant, Hearn, says : "We acted as a Board of Health from February 17th, on which day we organized." He also says that plaintiff was present when the Board was organized, and when a telegram from the Deputy Provincial Secretary was read announcing that defendants had been appointed a Board of Health, that a commission was mailed and that the Lieutenant-Governor had authorized the Board to organize and act immediately. This last statement the plaintiff denied, but he added : "From the outset I knew that negotiations were going on to appoint defendants a Board of Health, but I did not know of the actual appointment until October last ; they did not say to me in what capacity they were dealing with me ; all communications I got from them were signed by Hearn as secretary of the Board of Health." * * "I called defendants a "board" and everyone else here who spoke in reference to them called them a "board" from the very first." In a letter of March 5th, a passage from which is given above, referring to consultations with Dr. McPherson, plaintiff said : "I will continue my services to the Board as I have heretofore done." This letter he addressed to "J. H. Hearn, Esq., Secretary to Board of Health, North Sydney." On March 6th he made a report on the condition of the patients, addressed "To the Board of Health, N. S.," and so, also, on March 12th. Indeed, all throughout he recognized the defendants as a Board of Health, and knew they claimed to be acting as such. Plaintiff's counsel urged that the payment into Court in this action to meet the plaintiff's claim for medicine, &c., and services actually rendered, was evidence for the jury of an admission of indi-

vidual liability. No proof was given at the trial of such payment—the plaintiff recovered no verdict on those counts, and, besides, the law as regards payment into Court does not warrant that contention. The authorities referred to at the argument, and also *Baird v. Anderson*, 3 N. S. Decisions 181, we consider dispose of this point. It was also objected by plaintiff's counsel that the power of the Governor-in-Council to appoint a Board of Health is, by implication, taken away by the County Incorporation Act, chap. 1 of 1879, which enables the Municipal Council to appoint. We think that the power has not been taken away, but even if it could be shown that there was no statutory authority for the appointment, the plaintiff's difficulty would not be removed, seeing that the Government of the Province had at least clothed the defendants with the character of public agents, and would be liable for the engagement of its agents, (*i. e.*, if by defect in the appointment as a Board of Health, the municipality would not be liable.) As expressed in *Story on Ag.*, sec. 302, "It is not to be presumed that the public agent means to bind himself personally, in acting as a functionary of the Government, or that the party dealing with him in his public character means to rely upon his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the Government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man, and that it is ready, not only to fulfil them with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy." Something more is required, as evidence of an individual contract than merely acting *ultra vires*. It seems unnecessary to cite authorities in support of the principles on which we concur in thinking that the rule *nisi* for a new trial should be made absolute, further than those which are to be found in the passages of *Story*, already referred to, and in the cases mentioned at the argument; but the following decisions have peculiar point in illustrating these old and familiar principles, on account of the resemblance of the facts on which they were based to those presented to us in the present case:—In the *Leicester Waterworks Co. v. Nuttall*, 4 Q. B. D., 18, the Assessment Committee of the Barrow-on-

Soar Union appeared to defend certain appeals instituted by the plaintiff company against a poor-rate levied on their property, the Committee having the authority of the guardians of the Union to do so. They agreed to a reference to arbitration and signed, for that purpose, an agreement between the plaintiffs, on the one part, and the assessment committee, for and on behalf of the Board of Guardians, of the other part. The umpire reduced the company's rate and ordered the costs to be paid "by the other party to the said reference." The question was whether the Board of Guardians or the individual members of the committee were liable. The statute authorized the appointment of an assessment committee to investigate and supervise the valuation of property within the Union; but, in the proceeding out of which this case arose, they were acting *ultra vires*. MELLOR, J., held that the committee were not personally liable. He said: "They were merely a committee exercising statutory functions on behalf of the guardians." He evidently did not mean that in this particular they were acting within the statute, because he had already said, "the assessment committee had no power * * * to incur these expenses." MANISTY, J., agreed. He held that the statute conferred no power on the committee to refer to arbitration, but said, "an assessment committee cannot be sued. They are not a corporation and I do not understand on what principle they are to be made liable." It should be observed here that this observation had no reference to the form of action, because there was no attempt to sue the committee as a corporation. In *Eaton v. Basker*, 6 Q. B. D., 201, the case was tried by STEPHEN, J., without a jury. It appeared that on an outbreak of Scarlet Fever in and near Grantham, each of the three Boards which exercised authority in sanitary matters in the infected district, appointed a committee of three, and that these committees were amalgamated into one, as likewise a committee of two, which had been afterwards appointed by another neighboring authority. Subsequently, the corporation of Grantham was vested with the powers and liabilities of the three authorities first referred to. There was a statute authorizing the appointment of such committees, but the statute did not authorize a committee to enter into any contract. The com-

mittee of eleven employed a medical practitioner, and were sued by him, as these defendants have been. STEPHEN, J., held that the committee were not liable, saying: "It is to me clear that the contract was made with the committee, not in their individual capacity, but in their capacity as a committee. This is obvious from the evidence of the plaintiff himself, which is to the effect that Mr. Ashby met Mr. Eaton's, (plaintiff's) first proposal by saying that "the committee or council" would not agree to it, and that he asked Mr. Eaton to attend a meeting held that night, which he did. Now the committee is expressly forbidden to contract by section 200 of the Public Health Act, and, if it were capable of doing so, I think that the contract would not bind the individual members, for the reasons given in the somewhat similar case of *Leicester Waterworks Co. v. Nuttall*." In the case of *Eaton v. Basker* there was not nearly so much, or such distinct, evidence of the contract having been made with the "committee as a committee," as in this case there was that the contract was made with defendants as a Board, or as a committee, if the appointment as a Board was nugatory. Mr. Justice STEPHEN held, however, that the corporation of Grantham was not bound by the contract of the committee, considering the committee the agents of the corporation, but his decision on this point proceeded on a special clause of the statute. If the case had stopped here there might have been some doubt as to whether this decision should not have been merely treated as a finding by Mr. Justice STEPHEN on a question of fact, but the case went to the Court of Appeal, (see 7 Q. B. D., 529,) and it was there held that the section of the statute referred to by Mr. Justice STEPHEN as destroying the contract, did not apply, consequently, that the corporation was liable, but the decision below, as to the liability of the committee, was unanimously affirmed. BRAMWELL, L. J., said: "I think, however, that there is no case against the members of the committee, and the judgment in their favor must be sustained. If the plaintiff had failed against the corporation, possibly he might have had some remedy against the committee-men, for representing that they were invested with an

authority which they did not in fact possess, but in the view which we take the question does not arise."

We therefore decide that the rule to set aside the verdict must be made absolute with costs.

HARRISON v. HARRISON.

Before SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided April 10th, 1885.)

*Trespass.—Highway.—Drainage.—Dedication of Water-course.—Public Easement
Adverse enjoyment.—Prescription.*

ACTION of trespass against a Surveyor of Highways for cutting a ditch through plaintiff's land to carry off water from the highway, and for filling up another ditch in the highway, and thereby causing water to flow over plaintiff's land. Defence; To the first charge: That the former owner of plaintiff's land helped to construct the highway, and agreed to the cutting of the ditch for carrying off the water from the highway; that the ditch had been in use for that purpose for thirty-seven years; that occasional obstructions, during that time, had been removed by the Surveyor for the time being; that the ditch follows the natural course for the flow of water from the highway; and that the cutting complained of was a clearing out of obstructions which plaintiff had placed in the ditch a short time before. The defence to the second complaint was that the other ditch, was a ditch alongside the highway, too deep to be safe, and that the defendant, as such surveyor, partially filled it up, as he had a right to do. At the trial the Judge excluded the evidence of defence to the first complaint and a verdict, under his direction, passed for plaintiff.

Held, 1st. That the long use of the drain through plaintiff's land was evidence from which a jury might infer a dedication by deed, though there was evidence of an assent to such use more than twenty years ago. 2nd. That the defendant had a right, as such surveyor, to close or alter the ditches along the highway, as a private proprietor of land in the same situation might. Verdict set aside accordingly.

The following propositions were affirmed:—

That as to water not flowing in defined channels the flowing does not warrant the presumption of a grant.

That as the owner of the high land cannot collect such waters in drains and precipitate them on the land of another proprietor below, a grant may be presumed where this has been done as of right for twenty years, and this notwithstanding the Prescription Act, Cap 100 R.S., 4th Series, sec. 23.

That evidence that use began prior to twenty years by consent is merely evidence against presumption of a grant, and may be met by counter-evidence that the use was afterwards as of right, &c., for twenty years.

That the consent by parol to the establishment of an artificial course, made more than twenty years ago, is not conclusive that the subsequent twenty years use was not by grant because such a right could not be conferred by parol alone.

That a dedication to the public of an easement may be inferred from the like circumstances as warrant the inference of a grant in the case of a private person enjoying such easement.

That the surface and ditches of a highway may be altered without liability to an action by the adjacent proprietors.

This was an action of trespass for breaking and entering plaintiff's lands, and cutting a ditch from the adjacent main

road into and over said lands, for the purpose of draining water from the highway. Plaintiff's writ also contained a count for filling up a ditch on the main road adjoining the plaintiff's lands, through which the waters from the road were drained and had been hitherto carried away, and by reason of the filling up of which the waters from the road ran down upon and over the lands of the plaintiff. To the first count defendant pleaded that the drain through plaintiff's land was a public watercourse, and had existed for forty years before action brought, and that defendant entered as surveyor of highways, and because plaintiff had wrongfully obstructed said water course. To the second count defendant pleaded that the ditch in question had been made deeper than was necessary, and was dangerous to the travelling public, and defendant caused it to be partially filled up, but not so as to obstruct the water from flowing, as it had hitherto done.

By leave of the Court defendant pleaded two pleas, on equitable grounds, as follows :—

1. The said defendant, by W. M. Fullerton, his attorney, for a first added plea to plaintiff's declaration, by leave of the Court, on equitable grounds, says that at the time said public high road was built and made, and over forty years before this suit, the said land, in plaintiff's declaration mentioned, was the land and freehold of Tillot Harrison, the father of the plaintiff, from whom said plaintiff claims his title, and that one William Smith, who was Government Commissioner for building said main road, and superintended the construction thereof, and paid the money provided by the Government for the same, did, with the leave and permission, and at the instance and request of the said Tillot Harrison, dig said ditch in said declaration mentioned through and over said lands for the purpose of draining the water from said high road ; and the said William Smith, Commissioner aforesaid, paid for digging and making said drain with Government money, and the said ditch from that time continuously has been kept open and cleared out at the expense of the Government, by the expenditure of public money and statute labor, for the purpose of draining said public road for the use and benefit of the public ; and that the said plaintiff, since he became the owner of said land, has always recognized and acknowledged

the right of the public to repair, clear out, and use said ditch for the purpose of draining said road as aforesaid.

2. And for a second added plea, by leave of the Court, the defendant says that he did what is complained of by the plaintiff's leave.

Plaintiff replied abandonment, and excess.

The cause was tried at Amherst October 17th, 1882, before RIGBY, J., and a jury, who found a verdict for plaintiff, to set aside which a rule was granted as against law and evidence, and for the improper rejection of testimony, and for misdirection.

Sedgewick, Q. C., in support of rule.—The evidence shows a dedication to the public by the plaintiff's father, who, being Commissioner of Highways, dug the drain for the specific purpose of draining the water off the highway over his land. The easement having been so dedicated could not, afterward, be revested in the owner of the land. In repairing or draining a road, if damage is done to adjacent properties, no action lies; *Angel on Watercourses*, sec. 108, l. When there has once been a dedication it cannot be withdrawn or put an end to; *8 C. B., N. S.*, 848. The drain is an adjunct of the highway, and the right of entry to repair it is essential. Evidence of user was excluded. As to what constitutes a dedication cites *Angel on Highways*, sec. 142. (RIGBY, J.—Must the right not have been created in writing; *Angel on Watercourses*, 326. I do not think the statute in reference to possession of land for twenty years applies to easements. They must be adverse as before the statute. I thought this was not an easement because it was originally a license, which could be revoked.) The evidence here would have shewn a user for upwards of forty years. As to presumption of dedication from long continued user see *L. R.*, 6 App. Cases, 636. In the present case we have not only user but the fact of dedication proved. As to dedication of road, *11 East.*, 375.

Graham, Q. C., contra.—There is no such thing known to the law as the dedication of a gutter or of a right to have water flow from a highway over a man's land.

THOMPSON, J., now, (April 10th, 1883,) delivered the judgment of the Court:—

The defendant was sued for trespass *q. c. f.* for cutting a ditch through the lands of the plaintiff from the highway, and thereby causing water to flow from the highway on and over the lands of the plaintiff. He was also charged with filling up a ditch, at the side of the highway, adjoining plaintiff's lands, and thereby preventing the water from the highway from escaping through the last mentioned ditch, and causing it to flow over plaintiff's land. The defence to the first charge was that the ditch which defendant was charged with cutting was a public watercourse, or an easement for the draining of the highway, and that the alleged trespass was a clearing out of obstructions by defendant, as Surveyor of Highways; and, to the second charge, the defence was that the ditch at the roadside was so deep as to be unsafe, and that the alleged filling up was necessary to be done by defendant, as such surveyor, in order to ensure the safety of travellers, &c. The first of these complaints was, apparently, that which the plaintiff mainly relied on for his verdict at the trial, but he has recovered on both, and the substantial question to be decided was whether the water from the highway should be led off by ditches formed at the side of the highway or by the ditch which the defendant re-opened, and which ran through the lands of the plaintiff. The trial took place at Amherst, and raised important questions, which are new in this country, with regard to easements in watercourses and the rights of the public in such easements. The evidence by which the defendant sought to make out his justification was that when the highway was laid out, in 1841, Tillot Harrison, the father of the plaintiff, owned the lands, (now of the plaintiff,) in which the ditch is alleged to have been cut; that Tillot Harrison helped to construct the highway and agreed to the cutting of the ditch in the place where the defendant is charged with cutting it; that the highway was constructed by a Commissioner for the Government, and at Government expense; that ever since 1841, (the alleged trespasses were committed in 1881,) that ditch, in precisely its present position, drained the road, until the plaintiff stopped it up in 1878; that the obstructions placed in it occasionally during those

37 years were removed, and that for 37 or 38 years this ditch was kept open by statute labor or public money; that there was not and is not any other proper way of draining the road except through the ditch; that the ditch is the natural course of the water from the road, (*i. e.*, follows the natural inclination of the land); that Tillot Harrison died in possession of the lands, about thirty-two years after the making of the ditch, and that plaintiff has been in possession since. This evidence was rejected at the trial, the learned Judge ruling that the only defence which would avail the defendant would be that the opening of the ditch in 1881, if done as alleged, was done by the plaintiff's leave. As the defendant could not show such leave, having in fact relied on the public easement, a verdict for \$5 damages passed against him, and a rule *nisi* for a new trial was granted. It will be convenient, for the present, to regard the case as one occurring between two proprietors, and to assume that the defendant represented those who were the absolute owners of the land included in the highway, leaving for future consideration the difficulty which suggests itself in regard to the defendant not being in a position to claim an easement in his own right, or in right of any other particular person, but only attempting to justify, as a public official. We are of opinion that, in such a case the evidence which I have just detailed, would be evidence from which a jury might, at common law, have inferred, and from which, since the enactment with regard to prescription, the law would presume that the right to drain through the plaintiff's land had been originally conferred by deed. In reasoning in support of this view it will only be necessary and appropriate to consider the rules of law which relate to artificial watercourses, as distinguished from those watercourses which have, by process of nature, been formed into streams or beds of streams, with well defined channels and banks. The following propositions, with regard to this branch of the law, may be considered as established:—

1st. As to surface, or subterranean water, percolating, oozing, or flowing irregularly, and not in defined channels, from an upper territory, and escaping through or spreading over a lower territory, the flowing of the water, for any length of time does not create the presumption of a grant. Cases of

that kind may be illustrated by *Acton v. Blundell*, 12 M. & W., 336; *Dickinson v. Canal Co.*, 7 Exch., 299; *Rawstron v. Taylor*, 11 Ex., 380; *Broadbent v. Ramsbotham*, 11 Ex., 602; *Shury v. Piggott*, 3 Bulst., 339; *Chasemore v. Richards*, 2 H. & N., 168; *Swett v. Cutts*, 50 N. H., 439; in the last of which many other American cases are cited. In this class of cases the water passes off, not by any act, or in the exercise of any claim of right, of one of the parties, which could be interrupted by suit, but simply by the process of nature. In consequence of this principle it has been held that the proprietor of the lower territory may, notwithstanding the long continued, natural flow in undefined channels, and sometimes in defined, natural, channels, raise his lands or alter its levels, in such a manner as to turn the water aside, and the principle is the same in regard to the flow of surface water from a highway. The natural right of the upper proprietor to have the surface or percolating water pass to the lower territory, and the right of the lower proprietor to turn such water aside or turn it back, are well established by the civil and common law as a natural incident to the respective properties, and, because this is a natural incident to the right of property, the law will not warrant any inference, even from immemorial usage, that the right has been deduced from their mutual agreement.

2nd. The natural right, just stated, does not permit the superior owner to collect the water by a system of drainage and precipitate it upon the land below, and if this has been done for twenty years, as of right, a mutual agreement between the land-owners, by deed, or other sufficient formality will be presumed by the law, or, at the least may be inferred by the jury, because it will be presumed that an act so long openly claimed by the one party and acquiesced in by the other, was lawfully done, and it could only be lawful after such a convention between the proprietors.

The cases cited in support of proposition number one will, nearly all, sustain this proposition as a deduction from the principles which they lay down. In *Dickinson v. City of Worcester*, BIGELOW, C. J., said, in announcing that principle: "Nor can a party gain a right to the flow of surface water over his neighbor's land by collecting it in

drains or culverts or artificial channels, *unless he maintains them for a length of time sufficient to acquire a right or easement by adverse user.*" The case of *Hewlins v. Shippam*, 5 B. & C., 221, throws some light upon this point. The plaintiff, in his declaration, alleged that he had an inn and yard, and defendant, who was tenant of the adjoining premises, and his landlord granted to plaintiff, his heirs and assigns, license to construct a drain from plaintiff's inn, across defendant's yard, and to have water from the inn flow through the same, for so long a time as need and occasion might require. The drain was constructed, but the defendant obstructed it after four or five years. The agreement had been by parol. The Court of Kings Bench held that this was a parol conveyance of a *freehold* interest, because the uncertainty of its duration made it, if anything, an estate for life, determinable, &c., and that as such an interest could not, whether as an easement or as an interest in the land of the defendant, be created by parol, the plaintiff must become nonsuit, and that such a privilege must be given by deed. *Gilbert's Law of Evidence* is there cited by BAYLEY, J., for the proposition that "a man cannot claim a title to a watercourse but by deed and under seal," as also *Fentiman v. Smith*, 4 East., 107, in which Lord ELLENBOROUGH said: "The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed." This case was followed in *Cocker v. Couper*, 1 C. M. & R., 418, where it was held that the defendant had a right in 1833 to cut off a drain through his land which, in 1815, he had given the plaintiff permission to construct. It will be remembered that I am not now considering the effect of the evidence shewing that this drain was originally permitted, (orally it is argued,) by Tillot Harrison; that will be discussed hereafter; for the present I am confining myself to the proposition that an easement for such a continuance must have been by deed, because this will be an auxiliary to the proposition that the evidence of user will be evidence of a deed. The following cases may be referred to with advantage:—*Curtis v. E. R. Co.*, 98 Mass., 428; *Beeston v. Weate*, 5 E. & B., 986; *Wood v. Waud*, 3 Ex., 773; *Magor v. Chadwick*, 11 A. & E., 584; *Sargeant v. Ballard*, 9 Pick., 241; *Bolivar Manuf. Co. v. Nef. Manuf. Co.*, 16 Pick., 241; *Cary v. Daniel*, 5 Met., 236;

Crittenden v. Alger, 11 Met., 281; *White v. Chapin*, 12 Allen., 516; *Fentiman v. Smith*, 4 East., 107; *Finch v. Resbridger*, 2 Verm., 391.

In *White v. Chapin* it appeared that the defendant had filled up a ditch which carried surface water from the adjoining land. The drain was on the land a few years before 1836, in which year the plaintiff bought the dominant tenement, and in which his rights began, (because previously there had been unity of possession of the two tenants.) In 1837 he cleared out the ditch with the consent and assistance of the owner of the servient tenement. Two subsequent owners of the servient tenement kept the ditch clear; the plaintiff cleared it out twice within 16 years of the trial, which was in 1866, with defendant's acquiescence. A year before the action defendant filled up the ditch. FOSTER, J., in giving the judgment of the Court, cites a large number of cases in support of the proposition, that there was no natural right in the upper proprietor to dig the ditch, and that the long acquiescence in what would be a nuisance unless done by permission of the lower proprietor, will raise the presumption of a grant. In *Magor v. Chadwick*, DENMAN, C. J., said: "The proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the user of the water, if proved to have been originally artificial seems to us quite indefensible." This expression was quoted with approval in *Wood v. Waud* and *Beeston v. Waite*. In *Cary v. Daniels*, 5 Met., 236, WYLDE, J., in giving the judgment of the Court said: "The right which a party has to have the water of a stream or watercourse flow to or from his land or mill over the land of another is an easement or prædial service, and it is immaterial whether the watercourse be natural or artificial."

Leaving these two propositions as sufficiently established by the authorities, we have to deal with the contention, made at the argument of the rule, that if the evidence which was rejected had been admitted, it would not have availed the defendant, because there was evidence that thirty-seven or thirty-eight years before the interruption, the right to put the ditch on plaintiff's land was first given in parol by Tillot Harrison, the then owner, and that, consequently, there was

not a user for forty years, as would be required to establish an absolute and indefeasible right to the easement under section 28 of chap. 100, *R. S.*, 4th Series, nor such an adverse claim as the doctrine of prescription required. It must be conceded that the "absolute and indefeasible right" by forty years user was not established in this case, and that the defendant can claim no more than is above laid down, viz., that the evidence which he offered was evidence from which a grant would be presumed. The statute does not impair the right which the common law gave him in this respect, the first part of the section just quoted enhanced that right by providing that this presumption should not be defeated *merely* by proof that the enjoyment of the easement commenced within the memory of man, which was enough to rebut the presumption when, as at common law, the user must appear to have been immemorial before it would be available as proof of a lost grant or "prescription." The effect of the statute in favor of a legal presumption will be observed by a comparison of the case in *3 Bing.*, 115, with *Bright v. Walker*, 1 C. M. & R., 217. We think that the contention of the plaintiff's counsel in this regard cannot prevail, for the following reasons:—

1st. The evidence that the user began with consent, and was, therefore, not adverse, was, at most, only evidence in rebuttal of the evidence of user, and, even though, at the trial, it preceded in point of time, the evidence of user, it did not render the latter irrelevant, or otherwise inadmissible, but merely affected its weight; *Finch v. Resbridge*, 2 Verm., 391.

2nd. The defendant, if he had been allowed to give the rejected evidence, might have gone on to show that the consent was not by parol only, or that the parol license had ceased to operate on the case, because there was twenty years adverse user afterwards, as he had a period of fifteen years and upwards, between the time of the parol license and the time when the twenty years user would have been required to begin. It would have been useless for him to have offered any such evidence, however, after the rejection of the testimony as to the mode in which the alleged easement was used for the whole period, and after the intimation from the Court that nothing would avail him but evidence of a license in

1881 to clear out the ditch, which was the act for which he was sued.

3rd. The evidence of user was not, in our opinion, absolutely defeated by shewing that the user commenced by consent. If the consent had been shewn to be a license for any particular time, or qualified by any particular terms, which would either cut off a part of the twenty years user prior to the obstruction, or would give such a special character to the user that it could not be said to be a user *as of right*, the effect might have been different, but, for aught that can be seen in the evidence, Tillot Harrison meant to confer the right out and out; if he did, there might have been, and apparently was, *afterwards*, twenty years user *as of right*, which is what the law considers adverse, and this evidence would still be such that a grant might be inferred from it, inasmuch as the parol license would not have conferred a right, and it could not be supposed that the owners of plaintiff's lands would for twenty years, have acquiesced in enduring this burden, if it had not been imposed upon their lands by some more binding obligation. The cases which shew that the enjoyment of an easement for twenty years is defeated by proof that such enjoyment was permissive, proceed on evidence shewing permission, not at the commencement of the enjoyment, but *during* the twenty years of enjoyment relied on.

4th. The rebutting evidence of consent was a matter to be put to the jury along with the evidence of user and acts of both parties, because it was for the jury to say whether the presumption of a grant had been successfully rebutted or not. The jury might have put any one of several constructions, favorable to the defendant, on the evidence. They might have inferred that Tillot Harrison acquiesced in the construction of the ditch in consequence of some previous deed, or that he afterwards, and before the twenty years began, executed a deed conferring the right in accordance with his parol agreement. There was evidence already which might have been deemed by the jury corroborative of any of these views, or as convincing them that there was twenty years user *as of right*, such as that Tillot Harrison, years after the ditch was cut, cleared it out when *Surveyor of Highways*;

that nine years ago, when defendant was Surveyor of Highways, plaintiff required him to "take" his "men and clean out that drain from one end to the other," which was partly done; that plaintiff offered to clean out the drain himself five years ago, if his work would be considered highway work; that obstructions put into the drain were from time to time removed by the surveyor, as well as the accumulation of impediments by natural causes, &c.

Some of the cases already cited may be recurred to as illustrative of these points. In *White v. Chapin*, where the facts already recited above were so much like the facts here, there was stronger evidence than existed here of the twenty years user being permissive, because the clearing out, &c., had been, several times during the twenty years, done with the consent of the defendant, who was, in that case, the owner of the servient tenement, as the plaintiff is here; the action having been brought against him for filling up the drain which ran through his land. The Judge, at the trial, ruled that plaintiff was not entitled to recover without proof of continued adverse user for twenty years, and that the above evidence, if true, was insufficient to establish a title to the easement claimed, and so there was a verdict for the defendant; as, here, there was for the plaintiff, who stood in the like position. The verdict was right if the contention of plaintiff's counsel at the argument of this case be correct, that the evidence of Tillot Harrison's consent rebutted the evidence of user. The Court set the verdict aside, however, and the judgment contained these passages:—"Wherever there has been the case of an easement for twenty years unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless controlled and explained; and it is incumbent on the owner of the land to prove that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party." * * * * "In our opinion, therefore, there was evidence from which a jury would have been authorized to infer that the plaintiff had acquired the easement he contended for, and the case was erroneously withdrawn from their consideration. There was also evidence as to the

clearing out of the ditch by the owners of the upper lot, the construction and effect of which required to be submitted to a jury with appropriate instruction. Inasmuch as the owner of such an easement as the plaintiff claims has the incidental right of going upon the land below and clearing out the ditch when obstructed," * * * * "if plaintiff, when it became necessary to do that, sought license and permission from defendant and his predecessors, that would be evidence sufficient to rebut the presumption of a claim of right to use the ditch, and would shew that it was enjoyed permissively, and not adversely. If he had a right to the principal easement of drainage he needed no license to avail himself of the incidental right to keep the ditch in a condition to be an efficient drain. The clearing of the ditch by consent and by both owners together, may have been a joint repairing of a continuous watercourse, in which each claimed a right and which was maintained and used for the benefit of both estates, the owner above consulting the reasonable convenience of the owner below as to the time and manner in which he should exercise the right of removing obstructions," * * * "or it may be that a license to do so was asked and obtained which would" * * * "rebut the presumption of a grant." *Ashby v. Ashby*, 4 Gray, 198, was also an action for disturbing an easement, which was proved by about thirty years user, preceded by a parol reservation of such easement by plaintiff's grantor, in giving a deed to defendant, and a parol agreement by the defendant to such reservation and easement being reserved. SHAW, C. J., in giving the judgment of the Court, said:—"The Judge held that this evidence was competent, not because a right of way can be created by parol, but to shew that plaintiff commenced the actual use of the way under a claim of right. The Court are of opinion that this was correct, for the purpose and to the extent to which it was limited. The evidence had a tendency to shew that plaintiff used the way openly, as of right, against the owner of the soil, and so was adverse, and this was one of the elements for establishing an easement by prescription. The principle is that possession under a claim of title, with or without a deed, is adverse, and that principle applies as well to cases of easements as to the title of land itself." In *White*

v. *Loring*, 24 Pick., 319, there was a question as to whether a division by deed had ever been made between tenants in common, and the evidence of a parol agreement for partition was held some evidence from which the jury might conclude that a deed of partition was made. If these two cases be law the parol consent of Tillot Harrison was strongly in defendant's favor; under the former case, as shewing that the enjoyment was under claim of right, and, under the latter, as evidence of a deed. Other American cases to the same effect are cited in *Wash. on E. and S.*, 3rd ed., p. 135. In *Cocker v. Cowper*, 1 C. M. & R., 419, cited above, there was a verbal license to have a drain through the land of another; the enjoyment was stopped after about eighteen years, and it was held no action would lie, as the license was revocable. So far from its being contended or decided, however, that twenty years user would have availed the plaintiff after a parol license, the Court said that such an easement could not be conferred but by deed. "nor has the plaintiff acquired any other title to the water. In order to confer a title by possession it ought to appear that he has enjoyed it for twenty years." The case of *Hewlins v. Shippam*, 5 B. & C., 221, is not to the contrary, because the decision there was merely that the plaintiff could not recover on the strength of his parol license; there was not a possession of twenty years, and the plaintiff was relying on his parol license alone. In *Sumner v. Stevens*, SHAW, C. J., said, in an action relating to adverse possession of real estate, "The case shows that the tenant entered more than twenty years before the commencement of this action, under a parol gift from his father, and has had the sole and exclusive possession ever since. Had the tenant simply shewn an adverse and exclusive possession of twenty years, he would have shewn that the owner had no right of entry, and that would have been a good defence to the action. Is it less so that the tenant entered under color of title? A grant, sale, or gift of land by parol is void by the statute, but, when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant, and it equally proves an admission on the part of the donor that the possession is so taken. Such a possession is adverse. It would be the same

if the grantee should enter under a deed not executed conformably to the statute, but which the parties by mistake believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner ; but, the possession is taken by the donee, as owner, and because he claims to be owner, and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession, but until he does this by entry or action, the possession is adverse. Such adverse possession continued twenty years, takes away the owner's right of entry." In *Sickle v. Burn*, 4 A. & E., 369, Lord DENMAN, C. J., said:—"As the legal right to a way cannot pass except by deed, it is plain that the words "enjoyment as of right" cannot be confined to enjoyment under a strict legal right." * * * "They must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave *at the time*, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal, by prescription and adverse user, or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, *as by a consent or agreement in writing not under seal, in case of a plea of forty years, or by such writing or parol consent or agreement, contract or license in case of a plea of twenty years.*" * * * "The asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that *at that time* the asker had no right." * * * "An agreement *commencing within the period* may be given in evidence under the general traverse," &c., &c.

It has been suggested to us that there was a discontinuance of the user before action brought, sufficient to defeat the right under the 30th section of the *Limitation Act*. We see no sufficient evidence of that, and the jury would be required to pass on this question, which they have not done.

We have now to consider the objection that, in this case, a grant should not be presumed, because there is no evidence from which we can conclude that there was any person or corporation that ever stood in the relation of grantee of this easement. Defendant's counsel contended that where evidence exists sufficient to establish an easement in favor of an individual, if an individual occupied the position which the public does in this case, the easement does not fail, but that a *dedication* to the public is to be presumed, and that, in this case, the watercourse in question should be deemed to have been dedicated either to the Crown or to the public. There is much authority in favor of such a contention. This is the mode in which the existence of a way is generally proved, and there appears to be no principle or authority against the establishment of other easements, in favor of the public, by such proof. It was intimated, at the argument, that such a thing as this watercourse was beneath the character of those easements which are subjects of a dedication, but it has been held that a dedication to the public may be presumed, not only of a highway, but of a horseway, a footway, or a drift-way; *Poole v. Huskinson*, 11 M. & W., 827, and, in an American case, cited hereafter, of a spring of water. The subject is dealt with in *Washburne on E. and S.*, 179, beginning thus:—"From what has been said of the distinction between prescription, where there is assumed to have been a grant, with a grantor and grantee, and a custom, where, from the nature of the case, if there is a grant and a grantor, there is no grantee, the persons who were to enjoy under it being incapable of taking in their collective capacity, there could, obviously, be no prescription, properly speaking, for a right in the public to use a way, for the reason that there is no grantee in the assumed grant. It comes under the category of dedications." * * * "To authorize a dedication does not require the existence of a corporation to whom it is made, or in whom the title should vest. It may be valid without any specific grantee *in esse* at the time, to whom the fee could be granted. In this respect it proves an exception to the general rule of transferring or creating an estate in lands, as it may be done without a deed, and without any person competent to accept the grant as grantee." So in *Angell on*

Highways, section 132, "Dedication is an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public." Section 135:—"The parties to a dedication are the individual proprietor and the public at large, and it has, in some cases, been objected that a grant, to be valid, must be to some specific grantee, and that the public, not being such, the dedication was void," * * * "but the better view seems to be that dedication rests upon principles totally distinct from those which govern grants." * * * "By virtue of the appropriation which he has made, and by that alone, he is prevented from reasserting any exclusive right over the land so long as it remains in public use. His gift enures immediately to the public, and is limited only by the wants of the public at large." It is laid down in nearly all the authorities that the question whether such dedication has been made or not, is a question for a jury, and that, with regard to the facts which will support and call for a finding in favor of a dedication, all that has been heretofore said on the subject of prescription is applicable, with this additional feature in favor of the defendant, that a dedication to the public may be presumed from a user so short that it could not possibly warrant a finding of a prescription as between individuals. For the passage cited from *Washburne*, only American cases are given by the author, but the English authorities are abundant, beginning with the cases of *Rex v. Hudson*, in 1732, 2 Strange, 909, and of *Lade v. Shepherd* in 1735, in 2 Strange, 1004. In the *Queen v. East Mark*, 11 Q. B., 877, after a conviction on an indictment for non-repair, Lord DENMAN, C. J., said, "The Crown certainly may dedicate a road to the public and be bound by long acquiescence in public use." * * * "Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible." ERLE, J., said, "The Judge would have been quite justified in telling the jury that, although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention that the jury ought to find in favor of the dedication, unless there was some evidence that he did not consent." This dedication, it will be observed,

was presumed against the Crown and in favor of the public in the *Queen v. Petrie*, 4 E. & B., 737, which was a case of indictment for obstructing a highway. COLERIDGE, J., said, that the decision just quoted was sound and familiar law, and eight years user was held satisfactory evidence. WIGHTMAN, J., "I think that user by the public, for a sufficient length of time, as of right and openly, of an easement over land is evidence from which assent on the part of the owner, whoever he may be, is to be inferred. There is a public right inferred to exist from the public user." ERLE, J., "I take it to be clear law that open user, as of a right of way, by the public, raises a presumption of a public right to use that way, and that it is not necessary, in order to raise that presumption, to give evidence of the title," (*i. e.*, title of the grantor.) These two cases were followed in *Turner v. Walsh*, decided in the Privy Council in 1881, L. R., 6, Ap. Cases. Sir M. E. SMITH said: "From long continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption, may, and indeed ought to be presumed." In *Poole v. Huskinson*, 11 M. & W., 827, it was held that there cannot be a dedication presumed in favor of part of the public. Lord ABINGER, C. J., "The objection is to that part of the charge in which the Judge said that there would be a dedication to the public, if the owner intended to dedicate to a particular part of the public, as the inhabitants of a parish. It is quite correct to say that the owner cannot make a valid dedication to a part of the public." The following cases will be found to illustrate these views:—*Barraclough v. Johnson*, 3 Nev. & Perry, 233; *Roberts v. Karr*, 1 Camp., 262; *Rex v. Leake*, 2 N. & M., 595; *Stafford v. Coyney*, 2 B. & C., 257; *Rex v. Lyon*, 5 D. & R., 499; *Rex v. Lloyd*, 1 Camp, 260, and note *a* at p. 262; *Bartlett v. Pratt*, Thomson's Reps., 11; *Mercer v. Woodgate*, L. R., 5 Q. B., 26; *Vestry of Bermondsey v. Brown*, L. R., 1 Eq., 204; *Arnold v. Blaker*, L. R., 6 Q. B., 433. For examples of dedication for other purposes than for a way, reference may be made to *Pawlet v. Clarke*, 9 Cranch, 293; *Beatty v. Kurtz*, 2 Pet., 566-583; *McConnell v. Lexington*, 12 Wheat., 282, and *Post v. Pearsall*, 22 Wend., 480. In

McConnell v. Lexington, the subject of dedication was a spring of water, and in *Post v. Pearsall*, it was said that "all sorts of easements and rights to enjoyment of land, whether for use or pleasure, which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication." While the contention of defendant's counsel on this point seems to be thus well supported, it is very questionable whether he is required to go the length of asking that a dedication of the watercourse to the public should be considered as proved. It was not disputed that the drain was appurtenant to the highway, and it seems to us that, inasmuch as the evidence establishes the highway, the title to which, whether in the Crown or the public, is immaterial, and establishes that this drain was used for so long a time as an easement in connection with the highway, there is as much right to enjoy the easement as there is to enjoy that to which the easement is appurtenant, (see *Washburne on Easements*, ch. 1, sec. 11,) and that the defendant, as a public officer in charge of the highway, could well justify what he did by virtue of the highway rights which he had to exercise, not only over the highway itself, but over all that had become appurtenant thereto.

There is still another difficulty in the way of the plaintiff. He has recovered a general verdict, and the defendant has, therefore, been found in fault in respect of the closing of the drain which ran alongside of his highway, and appears to have been within the limits of the highway, and he has recovered it in the face of the plain and uncontradicted evidence that the closing of this drain was necessary for the public safety. Evidence to prove this defence was also rejected. If such a finding can be supported, the rights of the public in respect of highways will be very much restricted and the officers in charge of them will not have the rights which ordinary property owners have in relation to improvements and surface drainage. We have seen that in the case of an ordinary proprietor the right to have the surface water drain off to the property below is a natural incident of his property, and that he can alter the surface of his land, or its drainage facilities, (presuming of course that he acts in good faith), without being liable to the proprietor below, who, in

his turn, has, as a natural incident to his property, the right to turn such drainage aside by embankments or alterations in the levels of his land.

The plaintiff could, if the easement already referred to was not established, have penned back the waters which were directed to his land by the closing of the ditch on the road, but he could not sue the overseer for doing, within the limits of the highway, what in his discretion appeared necessary for the safety and convenience of the highway. If he could, he could sue for every raising or lowering of the roadway, and for every alteration of its ditches which would, in the absence of reasonable effort on his own part, tend to the injury of his property; and the rights of the public, acquired in the laying out or dedication of the highway could be reduced in value to a cypher. He could, in fact, immediately after the laying out of the site of a highway sue because a road had been formed upon it. If the highway was laid out and appropriated the right to alter its level and to change its drainage was acquired by the Crown or the public and formed a subject for the compensation paid to the proprietors, or which the proprietors could have claimed. If the highway was of that class which are known as "ancient highways," the origin of which cannot be traced on account of their antiquity, the proprietors on either side must be considered to have bought their lands subject to these rights on the part of the public.

These general principles are laid down in the English and American authorities, which are cited in the early part of this judgment, but a few other American cases may be referred to as illustrating their reasonableness.

In the case of *Inhabitants of Franklin v. Fisk*, 13 Allen, 21, CHAPMAN, J., in giving the judgment of the Court, said: "When highways are established they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travellers, and to use them for public travel, does not extend beyond the limits of the location." * * * "As against the adjoining owner of the fee the defendant, (being in the position of the plaintiff here), would have had a right to raise the surface of his land, or build a structure

upon it, so high as to prevent any surface water from coming upon it from the adjoining land. The public have no greater right to restrain him in the use of his land than they would have had if they had been absolute owners of the land included in the highway. They may raise the level of their travelled path, and do not violate his rights if the effect of their act is to cause the surface water to flow upon his land, and he may also raise his land or erect on it a building, or other structure, which shall prevent this effect without violating their rights." Similar cases will be found in *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; also, in 13 Gray, 193, 6 Id., 546; and 10 Allen, 591 and 106.

For the foregoing reasons we think that the rule must be made absolute with costs to set aside the plaintiff's verdict.

O'TOOLE ET AL. v. WALLACE ET AL.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, J J.

(Decided April 10th, 1883.)

Trover.—Defence in County Court that the value of the goods is over \$200.—Writ of prohibition.

DEFENDANT was sued in the County Court in an action of trover for goods and pleaded that the goods alleged to have been converted were of the value of \$600 and upwards and the County Court had no jurisdiction. The plea was demurred to and held to be good by the County Court Judge, who was about proceeding to try the case when a rule nisi was taken at the instance of defendants for a writ of prohibition.

Held, that the plea was not a good plea, as the damages claimed were only \$200 and the measure of damages in trover was not necessarily the value of the goods; and that, the Court having jurisdiction, the writ of prohibition could not be granted.

Plaintiffs brought an action in the County Court for District No. 7, against defendants, for the conversion of certain gold bearing quartz, and claimed two hundred dollars damages. Defendants pleaded, among other things, that the quartz in question was of the value of \$600, and that the Court had, consequently, no jurisdiction in the case. To this plea plaintiffs demurred, and judgment was given upon the demurrer for defendants. The cause now came before the Court on an application for a writ of prohibition to prohibit the County Court Judge from proceeding with the trial of the cause.

Wallace, in support of application, cites *Mayor of London v. Cox*, L. R. 2 H. L., 239.

Eaton, contra, cites 6 *Ontario Practice Reps.*, 63; *Ibid.*, pp. 323-336; 1 *L. M. & P.*, 388. (McDONALD, C. J.—How can you get on? Here is a judgment from which you have not appealed, that the Judge of the County Court has no jurisdiction. THOMPSON, J.—I think the effect of the judgment is that the plea is good, but if there is an issue of fact outstanding, the Judge must go on and try it.) After thirty days I am taken to have denied the facts. This raises two issues, one of law and one of fact. (SMITH, J.—Under the Practice Act you cannot plead and demur at the same time without leave. I doubt whether, with a demurrer outstanding, the statute would raise a replication. RIGBY, J.—Suppose, in the case of an action of assault, the defendant pleads that he committed the assault in self-defence, and the plaintiff demurs to the plea. If the Judge finds in favor of the defendant on the plea, must he not give judgment for the defendant, or would an issue of fact be raised by the statute which he would still have to go on and try? THOMPSON, J.—There are two questions, (1) whether there is a statutable replication, and (2) whether, if not, the plea was a good answer to the declaration.) The writ will not be granted unless it is made clear that the Court below has no jurisdiction. (THOMPSON, J.—Does that mean that the Court should see the want of jurisdiction from the record below, or from outside circumstances?) The Judge speaks of the facts. The County Court Judge thinks he has jurisdiction. (McDONALD, J.—He should have thought of that before he gave judgment on the demurrer.) Cites *L. R.*, 10 C. P., 379. The defendant had his remedy if the Judge below had gone on and tried the case; *High on Extraordinary Remedies*, 771.

RIGBY, J., now, (April 10th, 1883,) delivered the judgment of the Court:—

Defendants, having been sued in the County Court at Halifax, by plaintiffs, in an action of *tort*, in which \$200 were claimed as the damages, pleaded, with other pleas, that the goods “alleged to be converted and seized were of the value

of \$600 and upwards, and, as the said Court has jurisdiction to the extent of \$200 only, the said Court has no jurisdiction in this cause, and the Supreme Court alone has jurisdiction," and this plea upon demurrer, was held by the Judge below to be a good plea to the jurisdiction. Subsequently, notice of trial having been given, and the Judge having announced his intention to proceed with the trial of the cause, we granted a rule *nisi* for a writ of prohibition at the instance of defendants, who contended at the hearing that, as plaintiffs had admitted the allegations set forth in the plea by demurring thereto, and as the Judge of the County Court had overruled the demurrer and held the plea to be a good plea to the jurisdiction, he had no power to proceed further in the cause. To justify us in making this rule absolute, it should be clear upon the facts and law that the defendants are entitled to the remedy sought, and in case of doubt we may refuse the application. It was so held by BRETT, J., in *Worthington v. Jeffries*, L. R. 10, C. P., 380, and see also the judgment of HARRISON, C. J., in *re McKenzie v. Ryan*, 6 U. C. Prac. Reps., 323. It was suggested at the argument that the judgment of the Judge below upon the demurrer concluded us upon this application, and that we were bound to assume that the plea demurred to, (the statements in it being admitted,) established the action to be without the jurisdiction of the inferior Court; but, the authorities, we think, do not support this view. In *The Mayor and Aldermen of the City of London v. Cox et al.*, L. R., 2 E. & I. Appeals, at p. 262, Mr. Justice WILLES, referring to the distinctions between Superior and Inferior Courts says:—"Another distinction is, that whereas the judgment of a Superior Court unreversed, is conclusive as to all relevant matters thereby decided, the judgment of an Inferior Court, involving a question of jurisdiction, is not final. If the decision be for the defendant there is nothing to estop the plaintiff from suing over again in a Superior Court, and insisting that the decision below had turned, or might have turned upon jurisdiction. If the decision were in favor of plaintiff it is still not conclusive, 'because the rule that in inferior courts and proceedings by magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned,' per HOLROYD, J., in

Rex v. All Saints, Southampton, 7 B. & C., 785; *Rex v. Bolton*, 1 Q. B., 66; *Chew v. Holroyd*, 8 Ex., 249, *per* PARKE, B." Afterwards, at p. 264, he refers to the dicta in *Lucking v. Denning*, 1 Salk., 201, as to the judgment being an estoppel as to jurisdiction, as being wrong as to inferior courts; and again at p. 283 he says:—"If the defect be of jurisdiction over the cause, and that defect be apparent upon the proceedings, a prohibition goes after sentence. If it be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior court the facts ousting jurisdiction, and such court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a superior court that it was erroneous, obtain a prohibition." And in the case of *The Charkiel*, L. R., 8 Q. B., at p. 200, COCKBURN, C. J., says:—"If the Court finds contrary to evidence, in order to give itself jurisdiction, this Court would not be bound by its authority, or, if it gave a manifestly erroneous decision, although not for the purpose of giving itself jurisdiction, this Court would be entitled to look into the circumstances." The declaration in the suit under consideration contained counts for trover or conversion of, and trespass in seizing, taking, carrying away, and disposing of, to their own use, gold bearing quartz and other personal property. In such a case the County Court would have jurisdiction where the damages *claimed* do not exceed two hundred dollars, (sec. 17, County Court Consolidation Act,) which was the sum claimed in this action. We consider that, notwithstanding the admission of the truth of the statement in the plea demurred to, that the property alleged to be converted and seized, was of the value of \$600 and upwards, it does not follow that the plaintiffs, in such action, would be entitled to recover more than \$200 for their damages, the measure of which is not *necessarily* the value of the goods converted or seized, but the compensation for the loss actually sustained. *Non constat*, but the plaintiffs may have had only a special property in the quartz, &c., and the defendants may have been the absolute owners, in which event the plaintiffs' damages would be limited to the value of plaintiffs' interest. See *Bullen & Leake's Prec. of Pleading*, p. 293, (see also p. 291, where the distinction between an act of conversion and a

mere trespass is shewn.) It would be otherwise in *detinue*, for there plaintiff has judgment for the goods themselves, or their value, with damages for their detention, which was one of the points discussed in *Taylor v. Addyman*, 13 C. B., 309, in which a prohibition was refused.

We are unable, therefore, to concur in the judgment of the Judge below upon the demurrer, but are of opinion that the plea referred to raised no defence to the action, and that upon the facts before us, the defendants are not entitled to the writ. The rule *nisi* will be discharged with costs.

THE QUEEN v. MILLER.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, J. J.

(Decided April 10th, 1883.)

Acts not authorized by landlord, held not to constitute eviction.—Point not taken below will not be heard as ground for appeal.

IN an action for rent of land of which the defendant entered into possession under a tender made to Her Majesty's Principal Secretary of State for War, defendant contended that he had been evicted, first by a lease made of part of the premises to the Directors of Point Pleasant Park and by permission given by the Colonel of the Engineers to the French Cable Co. to erect a building on part of the demised Premises. The lease referred to was made subject to existing leases, and it did not appear that the Colonel of the Engineers had authority to give the permission complained of. Accordingly the judgment of the County Court was for plaintiff.

Held, that the judgment was rightly given for plaintiff on the grounds taken, and that it was too late on appeal to take the ground not taken in the Court below that the action should have been in the name of the Secretary of War as plaintiff.

This was an action brought by the Imperial Government to recover rent alleged to be due for property at Point Pleasant, in the City of Halifax, occupied by defendant under lease from the Crown. The conditions of the lease were embraced in a tender addressed by the defendant to "Her Majesty's Principal Secretary of State for the War Department," and in a memorandum signed by the defendant in which he acknowledged that he had entered into possession of the land upon the terms and conditions set forth in the tender.

Defendant appeared and pleaded, among other things, eviction and surrender. The fact upon which he relied in

support of his plea of eviction, was set out in his seventh plea as follows :—

And for a seventh plea to the said first count, defendant says that after the leasing of the premises by the plaintiff to the defendant, as mentioned in said count, and during the continuance of said lease the said plaintiff, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and seventy-three, entered into an agreement, under seal, with the Directors of Point Pleasant Park, being a body corporate, whereby the said plaintiff consented, covenanted, and agreed, and license was thereby given to the said Directors of Point Pleasant Park to use, occupy and enjoy as a public park, and for their use as and for a public park for the term of nine hundred and ninety-nine years the lot of land and premises described in said agreement, and on the plan thereunto annexed, which said lot of land, so to be used, occupied and enjoyed as such park by the said directors, embraced and included the lot of land and premises mentioned in said count, and for which the rent is claimed herein; and the said Directors, before the said rent became due, and before this suit, by and with the authority and consent of the plaintiff, entered into the possession of the premises thereby conveyed to them for a park, and against the will and consent of the defendant, wrongfully entered into and upon parcel of the said premises demised to the defendant by the said plaintiff, and which was then holden by the defendant as part of the tenements in the declaration mentioned, and then ejected and expelled the defendant from the possession, use, occupation and enjoyment thereof, and kept him so ejected and expelled from thence hitherto.

The cause was tried before James W. JOHNSTONE, Esq., County Court Judge for District No. 1, who gave judgment as follows :—

There is no question of title raised in this case which would oust this Court of jurisdiction to try the cause. The defendant signed a tender addressed to Her Majesty's Principal Secretary of State for the War Department, by which he agreed to become the tenant and occupy the lands mentioned in a schedule to the agreement for one year, and so on from year to year, upon certain terms and conditions therein contained.

He also signed a memo. by which he acknowledged that he entered into possession of the premises upon the terms and conditions mentioned in the tender. The tenancy commenced May 1st., 1869, and this action is brought to recover seven years' rent under the first condition in the tender.

By agreement dated December 30th, 1873, the Principal Secretary of State entered into an agreement with the Directors of the Point Pleasant Park, by which certain lands, including the locus which Miller held, were to be used, occupied and enjoyed by the public and by the Directors as a Public Park for the term of 999 years. One defence set up was that the Park Commissioners became the landlords of Miller, but this agreement was expressly made "subject until their determination of existing leases of portions of said lands." There is no assignment of the rent, nor was there anything to evince any intention on the part of the assignor that the Directors should receive the rents of the parts previously leased. I think, therefore, that this action was rightfully brought in the name of the Queen.

The 7th and 8th pleas set up this lease to the Directors, and charge an eviction by them; but their lease of itself disposes of these grounds, for, according to the construction I place upon the words above, which partake of the quality of an exception, though inartificially drawn, the Directors were inhibited from interfering with existing leases, and, until they were determined, the lands embraced in them were not in fact conveyed to the Directors, so that nothing they could do would amount to an eviction by the landlord. There was no proof that they acted in any way by the authority of the plaintiff, and any act on their part inimical to the right of the defendant as lessees from the Crown would merely constitute them trespassers. The Directors of the Park are now in possession of the house; whether they entered under any one or are in as trespassers did not transpire.

The defendant must then rely on his 3rd, 4th, 5th and 6th pleas, which severally allege that the term was put an end to by agreement between plaintiff and defendant: that defendant was evicted by the plaintiff, and that, upon the refusal of the plaintiff to restore to him the portion from which he had been evicted, he gave up the residue. And if either of these pleas

is sustained by the evidence, I think that the defendant has made out a defence to the action.

After the lease to the defendant, the French cable house was erected on a portion of the land leased to defendant, and it is now settled law that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The building of the house was not a mere trespass, but was of a grave and permanent character, and must have been done, by whomsoever, with the intention of depriving the tenant of the enjoyment of part of the demised premises; and I do not think that the consent of the defendant endorsed on the plan to the taking a portion of the land behind the house for a garden would enure to estop him from setting up the eviction from part of the demised premises by building the house as a defence to the claim for rent. By the 16th clause of the tender, the landlord might at any time determine the tenancy of the whole or any part of the demise by a demand of possession of the same, and, on such demand, the possession of the premises so demanded was to be considered as having ceased and determined. No such notice was proved to have been given, and therefore the sole question to be determined is this, was the eviction by, or by the authority of the landlord? The tender is addressed to Her Majesty's Principal Secretary of War Department, who was, by the third clause of the tender, to be designated landlord. There is no direct proof by whom the cable house was erected, but Grant, the agent of the defendant, deposed that he was present at a conversation had in 1874 between Colonel Montague and the defendant, in which the defendant complained of the erection of the house as an interference with his right, and asked the Colonel if he had given permission to the cable company to erect the house, to which the Colonel replied, "yes." Colonel Montague at the time commanded the Royal Engineers in this garrison. Now, by what authority did Colonel Montague give the permission? Of his own mere will,—if so, his act was that of a stranger, or as agent of the landlord? It is here that I think the defendant's case breaks down. The only evidence we have on the point came out on the cross-examination of Mr. Willis, who testified that the Engineer Department have charge of

the lands of the Imperial Government, that the Commissary General issues the leases, and that the Colonel of the Engineers would have all the papers. Now it is quite possible that the Engineer Department might have the charge of the lands, and yet the landlord not be bound by any act amounting to an eviction, and especially is this possible if we look at the tender. By clause 6 the landlord or his agent is empowered to enter twice a year on the premises to ascertain their state and condition. To this, and this only, Mr. Willis may have referred when he said the Engineer Department had charge of the lands, but, by clause three, the tenant undertook not to sublet or part with the possession without leave in writing under the name of the Principal Secretary, (the landlord,) his successors or assigns, and so in other clauses the tenant is prohibited from doing various acts without the leave of his landlord. I gather from this that the Colonel of Engineers' authority was limited to superintending the property, and that he was not such an agent that any act of his would amount to an eviction by the landlord. If it were otherwise it was in the power of the defendant, by calling some one from the Engineer Department, or by other evidence, to have settled the point as to the amount of authority delegated to the Colonel of Engineers. This is not an eviction by title paramount, in which case the rent might be apportioned. The same objection applies to the other plea. There is no proof that Colonel Montague was authorized to refuse defendant permission to occupy the house, to cancel the lease, or to relieve him from the payment of the rent. And where the parties are standing on their legal rights, in the absence of proof to the contrary, I have no right to assume that Colonel Montague, in any act of his, was other than a stranger for whose doings the landlord could not be held responsible. Nor can I assume, in the face of the agreement giving the Park Commissioners the locus subject to the determination of existing leases, that they were put in possession of the house by the landlord. Nor is it a question to concern me for whose benefit this suit may have been instituted. This action is undoubtedly hard on the defendant, because, after his conversation with Colonel Montague, the evidence is that he did not interfere further with the locus, but considered his tenancy as

terminated, and had he not reposed faith in the statements made to him, and relied on their being carried out in their integrity, he would probably have given the notice to quit required by clause 15th of the tender. I, however, think that the strict rule of law requires me, as the evidence stands, to give judgment for plaintiff for the amount claimed.

A rule was granted to set aside the judgment so given, and now, (February 10th, 1883,) came on for argument.

McCoy, Q. C., in support of rule.—There is no evidence that the land is that of the Queen. The only evidence is that the contract was made with the Secretary of State, who is styled landlord, and who, alone, has the right to enter. The agreement shows that it was not made on behalf of the Queen. By chapter 7 of the Provincial Acts of 1867, the title to Ordnance Lands in the Province is vested in the Secretary of State for the War Department, in whose name actions are to be brought. (RIGBY, J.—That point was never considered in the Court below. To appeal from the Judge's decision on a point of law, you must have the point considered by the Judge.) The title of the plaintiff is a question of fact. The objection may be taken here if not taken below, if it is apparent on the face of the proceedings; *14 Moore, P. C. C.*, 290. The Court here must take judicial notice of the statute. The defendant was evicted. Plaintiff cannot recover for seven years rent. (RIGBY, J.—There is no plea of the statute.) As to points not taken below cites *L. R.*, 4 Q. B. Div., 500; *L. R.*, 8 C. P., 416. There is evidence of a surrender. The intention of the County Court Act is that there should be an appeal from everything.

Sedgewick, Q. C., contra.—As a matter of fact defendant occupied and used the property to the present time. His cattle pastured upon it, and no one interfered with his enjoyment except in regard to the cable house. (MCDONALD, C. J.—There is evidence that Colonel Montague said no rent would be asked, and that in fact none was asked.) The cable house was built with the assent of Miller. (MCDONALD, C. J.—The property was that of Miller as long as he held the lease, and it was an intrusion on the part of the Commissioners to put any one in. It looks as if it were done under the

agreement with Colonel Montague that no rent should be demanded.) There is no evidence of any authority in Colonel Montague to determine the lease in any other manner than those provided in the lease itself.

RIGBY, J., now, (April 10th, 1883,) delivered the judgment of the Court:—

It was contended at the argument of this appeal, that Her Majesty's Principal Secretary of State for the War Department, to whom the written tender put in evidence, signed by the defendant, was addressed, and not the plaintiff, was entitled to recover the rent in question in this cause. This point does not appear to have been taken in the Court below, where, if such an objection had been urged, evidence might have been introduced to establish the right of the plaintiff to recover the rent involved, or the proceedings might have been amended so as to obviate the suggested difficulty. It is well settled that under such circumstances, courts of appeal refuse to entertain objections for the first time raised before them at the hearing of the appeal. Besides, it has been held in the Queen's Bench Division of the High Court of Justice in England, in the case of *Clarkson v. Musgrave et al.*, 9 Q. B. Div., 386, that it is a condition precedent to the right of appeal under section 6 of the County Courts Act of 1875, that the question of law which it is desired to appeal from should have been raised before the County Court Judge at the trial, and, on reference to that section of the English Act, it will be found that the words on which that decision turns are very similar to those used in section 99 of our County Court Consolidation Act. We agree with the Judge of the County Court that there was no sufficient proof of any authority on the part of Colonel Montague to affect the rights of the parties interested in the lease in question, by his acts. And in the absence of such proof, and the lease to the Directors of Point Pleasant Park having been made, "subject until their determination of existing leases of portions of said lands," there is nothing to maintain defendant's plea of eviction, or surrender, even if the former could be set up as against the admitted possession by defendant of the premises and payment of rent

under his lease, subsequent to and with knowledge of the acts relied upon in support of that defence.

We think the appeal should be dismissed with costs.

MORGAN v. RICE.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J J.

(Decided April 10th, 1885.)

Trover.—Right of Crown in respect of trespasses to Crown property, not limited by R. S. cap. 12.

PLAINTIFF applied for a grant of Crown land and, while the application was pending defendant illegally cut a number of logs on the land and removed them. The logs were seized by a Crown surveyor under section 3 of cap. 12 R. S., (4th Series), and were afterwards driven to defendant's mill and sawn up. Plaintiff, having first demanded the logs, brought trover for them and obtained judgment in the County Court.

Held, that the Crown was not limited to the condemnation proceedings set out in cap. 12 R. S., (4th Series), as the chapter did not expressly take away its existing remedies, but that, as there was no evidence that the plaintiff had ever had possession of the logs the appeal must be allowed.

This was a rule to set aside a judgment for plaintiff in an action of trover for the conversion of certain logs. Plaintiff made application for a grant of fifty acres of Crown Land in the County of Digby. The logs in question were cut while the application was pending, and removed before the land was run out by the Surveyor. They were traced from the place where they were cut to a place in the neighbourhood where a large number of logs were lying, but none of them could be identified as having been cut on the plaintiff's land. A number of the logs so found were seized and marked by Comeau, a Crown Surveyor, and the property, under authority from the Government, transferred to the plaintiff. After this they were removed by defendant to his mill and sawn up. The cause was tried before SAVARY, County Court Judge, who gave judgment as follows:—

As against a mere wrong-doer, admitting himself to be such, and acquiescing in the seizure, the title given by Comeau to the plaintiff, under the authority of the Government, was

good, especially as the defendants acquiesced in the seizure, by which Comeau took actual possession of the logs—the logs, not yet being on defendant's land, or in his exclusive or adverse possession, but on wild, unenclosed land of a third party, over which all parties passed in logging at pleasure. To decide otherwise would be to trifle with the public rights and give a premium to trespassers.

As there is no doubt of the conversion by the defendants, the judgment will be for 23 spruce and 25 pine,—\$81.50

Longley, in support of rule, was stopped

Harrington, Q. C.—There is evidence that Comeau was a Surveyor for the County of Digby, and that Austin acted as an official for the Crown Land Office at Halifax. There is also evidence sufficient to go to the jury as to the identity of the logs. (RIGBY, J.—No one can say that any particular log came off of that land.) There are counts in both trespass and trover. (MCDONALD, C. J.—You had no possession or right to possession, if the action is trespass.) Where logs are cut on Crown Lands by a trespasser the Deputy reports to the Commissioner who may order a sale. In this case that course would not be pursued, because the land of which the logs were a part was sold to the plaintiff. The transfer of the land to plaintiff was equivalent to a sale of the logs. The evidence of Comeau, the Surveyor, is that he seized the logs in compliance with the instructions from the Government.

Longley, in reply.—If Comeau had any power to seize it was only such as was derived from the statute. The statute provides exactly the course he is to take. Anything done otherwise than in accordance with the statute is void. The Surveyor, here, holding the logs under the statute, undertook to hand over the logs to Morgan as his absolute property. (RIGBY, J.—Though that would not give title, would it not give possession to support trespass?) No. (WEATHERBE, J.—As a matter of fact he did give him possession.) I don't admit that. There is no evidence that the Surveyor received any instructions after he made the seizure or that he ever delivered possession to plaintiff; 30 U. C., Q. B., 607.

RIGBY, J., now, (April 10th 1883,) delivered the judgment of the Court:—

This is an appeal from a judgment of the Judge of the County Court at Digby in favor of plaintiff. Certain pine and spruce logs had been illegally cut upon Crown Lands, (for a grant of which plaintiff was an applicant,) and, having been removed off such lands, were seized by a Crown Surveyor under the provisions of section 3 of chapter 12 of *Revised Statutes*, "Of trespasses to Crown Property," and, having afterwards been driven to defendant's mill, and some of them sawn up, a demand was made by plaintiff upon defendants, and this action brought to recover damages for seizing and converting the logs in question, title to which was claimed by the plaintiff from the Crown. It was contended at the argument that for such trespasses to Crown property the Crown must proceed by seizure, sale, condemnation, or other disposition of the property provided for in the chapter of the *Revised Statutes*, to which reference has been made, and that unless the plaintiff in the present case had established a title to the logs in question under condemnation proceedings in pursuance of section 5 of the Act, he could not maintain this action. I am of opinion that such a contention is not sustainable. Even if it appeared that, as against a subject, such a construction might be implied from the terms of the act, yet, to limit the Crown to the proceedings under the act, other remedies then existing should have been *expressly* taken away. The object of the act was evidently to afford the Crown a convenient and inexpensive means of determining the right to the property referred to in it, and thus to avoid the expense and delay consequent upon litigation which would otherwise ensue when such right should be contested; but I see nothing in the act to limit the Crown in all cases to such means, or to prevent it from adopting any other mode of procedure for the recovery of its property, or damages for trespasses committed to such property, or to seize, sell, or otherwise dispose of the timber or materials taken from Crown Lands in the same way as any subject might repossess himself of his personal property, or dispose of it. The letters from Austen to Comeau, we think, should not have been

received in evidence without proof of the authority to the former from the Attorney-General. But in any case, even if it was shewn that Comeau had been authorized to hand over the logs to the plaintiff, there is no evidence that he did so, or that plaintiff ever had possession of them. Mere possession in the plaintiff under Comeau, as against the defendants, would have been sufficient to entitle the former to maintain this action; and, even in the absence of authority from the Attorney-General, if the evidence had shewn that Comeau had delivered the logs to plaintiff before the conversion by defendants, we would not interfere with the judgment below. It does not appear, however, that after the logs had been seized and marked, and Comeau had reported to the Department, possession of the logs was ever taken by plaintiff, and Comeau says in his evidence that after he reported to the Government "nothing further was done."

We think, therefore, the appeal should be allowed with costs, and the case remitted to the Court below, that it may be retried if the plaintiff is so advised.

WALKER v. CITY OF HALIFAX.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, JJ.

(Decided April 10th, 1883.)

A Nuisance in the Highway.—Special damages.—Whether City liable for non-repair of streets damaged by ice and snow.—Notice of action.—Lawful traffic.

THE principal streets of Halifax were in such a condition from accumulation of ice and snow hardened into irregularities of surface, that the plaintiff, owner of a line of omnibusses, had his vehicles injured and suffered loss of custom. The non-repair continued most of the winter and after full notice to the City authorities.

Held, 1st, that the City was liable for plaintiff's injuries; 2nd, that negligence had been proved; 3rd, that plaintiff was not guilty of contributory negligence in not using other streets. instead of those complained of; 4th, that notice of action by plaintiff's attorney was sufficient and unobjectionable, although in the alternative as to amends being paid.

Where an individual or corporation is liable to indictment for non-repair, an action will lie at the suit of one who suffers special injury.

Liability is not, in all cases, to be inferred from enactments placing the highway under defendant's control. The obligation must have been imposed on or transferred to defendant.

No distinction exists between non-feasance and mal-feasance, in relation to such liability

This was an action for damages on account of injuries sustained by sleighs, &c., owned by plaintiff, a licensed omnibus.

proprietor in the City of Halifax, in consequence of the defective condition of the streets, caused by the accumulation thereon of excessive quantities of snow and ice. The cause was tried at Halifax before McDONALD, C. J., with a jury, in November, 1882. The learned Chief Justice charged the jury as follows :—

I explained to the jury the nature of the action and the duty imposed upon the defendant Corporation to keep the streets and highways of the city in repair, and their liability for injuries resulting from the defects in those streets. I instructed them that the state of the particular streets referred to in the evidence, and as described in that evidence, constituted, if proved to their satisfaction, defects of a character similar to that of a ditch or cutting in the street caused by water after a heavy rain or freshet, and that, in point of law, the city would be equally liable for defects, obstructions or injury caused by snow allowed to accumulate in excessive quantities, and causing the pitches described in the evidence, as for defects, obstructions or injuries caused by rain or other such agent. I told them the defendant would be liable only for injuries caused by a defect or obstruction, of which they had actual notice, or which had existed long enough or notably enough, for notice to be reasonably inferred, and I directed them, if they found that the pitches and obstructions described in the evidence as caused by the non-removal of accumulated snow from the streets, did exist, as testified by the plaintiff—that the defendant knew, or reasonably ought to have known, that these defects and obstructions existed, and were dangerous to the public passing and repassing along these streets in pursuit of their ordinary business and traffic, and that the plaintiff's horses, carriages and harness were injured and damaged in consequence, and by reason of these defects and obstructions in the streets, their verdict should be for the plaintiff.

The jury found a verdict for plaintiff for \$600 damages, to set aside which a rule was granted as against law and evidence and for misdirection. The rule came on for argument February 2nd, 1883.

G. Ritchie and Ritchie, Q. C., in support of rule.—Where the defect is caused by snow, it should be left to the jury

whether the snow could be reasonably and easily removed, and without excessive expense; *Caswell v. St. Mary's*, 28 U. C., Q. B., 251. (McDONALD, C. J.—The question is, whether the onus is not on the defendants to shew that the defect was irremediable. I directed the jury that the defect was to be considered as the same as a trench cut across the road by an unusual rain storm.) In actions against a Corporation, if the the danger has been the same to every one, the plaintiff cannot recover unless he has sustained some exceptional injury; *L. R.*, 9 C. P., 400; *L. R.*, 2 Exch., 216; *By-Laws*, Clause 5, relating to omnibusses. (*Harrington, Q. C.*, objects that the ordinances were not put in evidence, but were merely on the back of the license. The by-laws must be proved. McDONALD, C. J.—They were commented on. RIGBY, J.—Were they read? *Harrington, Q. C.*—No. *Ritchie, Q. C.*—I had the by-laws at the trial certified, and would have put them in if they had not been put in by the other side. RIGBY, J.—All that we can infer from the minutes is that the license, whatever that may mean, was put in and read.) The omnibusses were not run according to the license. The notice of action given by the plaintiff to the city was insufficient, 1st, because it was conditional. (*Harrington, Q. C.*—Want of notice is not pleaded.) *Roscoe's N. P.*, 1185. The notice must be complete in itself and cannot be made in a series of letters, each containing one or more elements. The notice must be by the plaintiff himself. The notice should be a simple notice to the city that they would be sued on a certain day. (McDONALD, C. J.—It seems to me the notice of July 1st, 1882, was as explicit as anything could be.) As to notice being conditional, cites *10 A. & E.*, 188. (RIGBY, J.—I don't think that the conditions referred to are such as that if certain demands are not complied with, action will be brought.) There is no obligation on the city to remove the snow and ice from the centre of the streets. If there is it should be shown; *39 U. C., Q. B.*, 113; *22 U. C., Q. B.*, 560; *23 U. C., C. P.*, 93. The fact that the pitches extended for half the route is in point as to the reasonableness of expecting the city to level the streets.

Tremaine, (with whom were *Harrington, Q. C.*, and *Henry, Q. C.*), contra.—The last notice was entirely unconditional.

(MCDONALD, C. J.—If you have any cases in reference to snow you had better give them to us.) We are not driven to the question of expense. It was not pleaded, and there is nothing to show what it would cost. (MCDONALD, C. J.—My impression was, that if the expense would be excessive the city should show it.) I have a number of cases to show that the city is liable for allowing an excessive accumulation of snow ; but, first, I take the objection that there was no plea that can raise it. (RIGBY, J.—It seems to me that the gist of the action is negligence, and that the defendants may show the extent of the accumulation of snow.) 16 U. C., C. P., 43; 17 Howard, 161; 12 Cush., 488; 13 Pick., 343; 10 Cush., 260; 12 Allan, 566; 12 Allan, 572; Harrison's Municipal Manual, 483, and cases cited, 39 U. C., Q. B., 113; 28 U. C., Q. B., 247; 14 U. C., C. P., 299; 16 U. C., C. P., 43. We do not contend that the city should remove the snow, but that they could easily and conveniently remove the pitches by cutting them down and filling them up.

Tremaine was stopped and *Ritchie*, Q. C., called upon, contra.—The whole of the evidence is general, and no particular injury is proved at any particular time. The whole thing is general wear and tear during the period complained of. (RIGBY, J.—There were broken poles and harness, and two busses split up. It was for the jury.) The damage was general. Besides that, the complaint is that the whole street was impassible. If the obstruction was confined to particular places it would be different. The injuries complained of extend from 20th January to 11th March. The case in 28 U. C., Q. B., is almost exactly in point; 15 U. C., Q. B., 427; We have no statute imposing any further duty than to break through the drifts. The American cases turn on special statutes. There is no common law liability; 39 U. C., Q. B., 113; 13 Pick., 343; 7 Mass., 13; 9 Mass., 247; 2 T. R., 667; 9 Exch., 609; L. R., 1 E. & I. Ap., 93. There was evidence to go to the jury whether the city had not done everything they were bound to do to keep the road in repair. There was work done continuously on the streets in levelling pitches, from January, as long as the snow lasted, and nearly a thousand dollars expended. The plaintiff himself proved

that he was not more injured than anyone else. If the plaintiff, under his license, was not confined to these particular streets, and they were impassible, it was his duty to have turned aside into other streets. The plaintiff has not shown clearly that the busses which were injured were licensed busses. If the busses were not licensed the plaintiff was a wrong-doer. There is no provision that the attorney can give notice of action. (RIGBY, J.—It contains all that is necessary to inform the city that James F. Walker intends to bring an action for damages against the city.) The notice is not complete in itself. It refers to letters previously written, which cannot be made part of the notice. The notice is conditional, inasmuch as if the letters referred to in it are introduced, the conditions contained in them are also introduced; *Holt*, 27.

THOMPSON, J., now, (April 10th, 1883,) delivered the judgment of the Court:—

The plaintiff recovered a verdict of \$600, as compensation for injuries which he sustained in his business as proprietor of a line of omnibusses plying in the principal streets of the city, during the winter of 1881-2, by reason of those streets being for a long time obstructed with ice and snow,—the surface of the roadways being rendered uneven by alternate hills and hollows of hard snow or ice, to such an extent that the omnibusses could only ply at long intervals, and at a slow rate of speed, at a great outlay for repairs, with great injury to horses and vehicles, and with great reduction in the number of passengers. The evidence showed that during a considerable part of that winter those streets were covered by a thick deposit of snow and ice which was formed into these undulations by various causes, among which were the drifting of the snow while falling, the throwing of snow from sidewalks, and, chiefly, the wear and abrasion caused to the snow-covered highway by the volume of traffic which those streets had to accommodate. The omnibusses and harness of plaintiff were repeatedly broken, his horses were damaged, and the locomotion was rendered so dangerous and unpleasant that but few persons, comparatively, would ride. The city authorities had full knowledge of the state of the streets, and

performed some work of the kind that was requisite to make them passable, but the work so done was entirely inadequate to the requirements of the case. There can be no doubt that the condition in which these highways were proved to be, was a state of non-repair and nuisance, and the officers of the city left them in that condition, either from negligence, or from a belief that they were under no obligation to do otherwise. The application for a new trial depends almost entirely on three points :

1. The liability of the city for non-repair of the streets.
2. The right of the plaintiff to sue on account of the non-repair—in view of his own conduct, and in view of the enactments in reference to omnibus business, etc.
3. The sufficiency of the notice of action.

The learned Recorder argued that the city was not liable to be sued for non-repair, or that at any rate, the repairs required to have prevented the injuries complained of, were so extensive as to be unreasonable. We are, therefore, under the necessity of examining fully the grounds on which such a liability can be asserted. This does not appear to have yet been done in this Court, although the actions against the city have been numerous. Such of them as have found place in the reports turned upon other points. In *Evans v. Halifax*, 1 Old., 111, the negligence which caused the injury was held to be that of a person other than defendant; in *McKinlay v. Halifax*, 2 R. & C., 305, the Court held that negligence had not been proved under the special circumstances of the case; in *Adams v. Halifax*, 1 R. & G., 344, this point was not taken, and in *Ward v. Halifax*, 3 N. S., Dec., 264, the facts were such as to place the case in a different class from that to which this belongs. Both in England and the United States the authorities on the question of the liability of such a corporation as the defendant for non-repair are conflicting and the confusion which such a conflict necessarily creates has been increased by the inconsistent interpretations which have been given to the leading cases as they came up from time to time for review. Cases which have never been denied to be law have been treated by the courts, at one time as establishing non-liability, at another they have been

explained as not referring to that question at all, at a third the original interpretation has been re-asserted, only to be again dispelled. Our task would be perplexing, therefore, if we had to reconcile the cases, or to deduce from them a settled rule of law which would overturn all the decisions which were not in harmony with it. It may not be unprofitable to dwell for a short time on the fluctuations of opinion which have taken place in regard to some of the authorities, as by doing so we shall be led, not only to an appreciation of the difficulties presented, but to a practical solution of them.

The very comprehensive judgment of Chief Justice GRAY, in *Hill v. Boston*, 122 Mass., 344, shows by a comparison of the early cases that the primary authority on this question, the note from the year book, 5 E. IV., 2 pl. 24, to be found in *Brooks' Ab.*, to the effect that one who had his horse injured, in a miry way, which has not been repaired, has no action—because it is a case in which no individual can have an action, but in which the remedy is by presentment,—was long understood as referring merely to the familiar principle, that in the case of a public nuisance no one has a remedy by action who has not been more specially injured than the public generally, but, in late years, has been sometimes interpreted as denying that an action can be brought, even in case of a special injury, resulting from the non-repair of a highway or bridge. Another illustration of conflicting views is furnished by the oft-quoted case of *Russell v. The Men of Devon*, 2 T. R., 667. In that case the liability to repair a certain bridge was upon the County of Devon, and in consequence of its being out of repair the plaintiff suffered an injury, and brought his action. The County was not incorporated, and so, according to the practice then and long afterwards prevailing in cases of indictment, the process ran against *The Men living in Devon*, the plaintiff claiming a right, if he should get judgment, to take such of them, or the property of such of them, as he could find. Two of the *Men of Devon* appeared and demurred. Lord KENYON and Mr. Justice ASHURST delivered judgment against the plaintiff. The views of those Judges are expanded in the report of *Durnford and East*, but, at this day, it is almost futile to consider what that judgment *says* or appears to us to *mean*, in view of what it has been held to mean by

the courts that have had it under review at various times. Turning to some of the cases in which it has been expounded, we find that in *Henly v. Lyme Regis*, 5 Bing. 91, (in the Common Pleas,) Russell's case was treated in argument as having been decided on the ground that the Men of Devon were not a corporation, and therefore not suable, and afterwards, (in the House of Lords, 2 Cl. & Fin. 352,) Mr. Justice PARK laid down a dictum which would have been directly contrary to Russell's case, if the latter was to be considered as deciding the question of general liability. But in *McKinnon et al v. Penson*, 8 Ex., 319, at page 321, ALDERSON, B., said: "According to the authority of *Russell v. The Men of Devon*, the County are not liable to an action unless there is some Act of Parliament which makes them so," and, accordingly, held that the mere transference of the County's liability to an individual capable of being sued does not give a remedy by action. However, in giving judgment, at p. 327, POLLOCK, C. B., said: "We think it clear, on the full consideration of that case, that the only reason why the action would not lie was because the inhabitants of the County were not a corporation and could not be sued." In the same case, in the Exchequer Chamber, 9 Ex., 609, at p. 613, COLERIDGE, J., said that *Russell v. The Men of Devon* proceeded on the ground that it was better that the hardships which individuals suffered should be tolerated, and the remedy given only to the public by criminal proceedings." In *Gibson v. Mayor et al. of Preston*, L. R., 5 Q. B., 218, at p. 222, HANNEN, J., says: "It is true that in *Russell v. Men of Devon* the argument chiefly insisted on was that the action would not lie because the inhabitants of a County are not a corporation, and therefore cannot be sued collectively, but the reason relied on by Lord KENYON and ASHURST, J., was not so much the technical one referred to as that which is expressed in Brook's Ab. tit. Ac. on Case Pl., 93, * * that inasmuch as the highway ought to be repaired by the public, an injury arising from the neglect cannot be the subject of an action, but is only ground for the Crown interfering." Finally, in a case on which we principally rely for guidance, (*Borough of Bathurst v. McPherson*, 4 App. Cases, 256, at p. 268,) the judgment of the Court, delivered by Sir Barnes PEACOCK, says: "The principal

objection taken * * to the maintenance of the action, was founded upon the nature of the supposed obligation, viz., a liability to repair public roads, and upon the authority of *Russell v. The Men of Devon*, and of some others, *in pari materia*. In these cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are, no doubt, dicta to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation, if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish, or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable." While this last cited case stands it will afford, for this Court at any rate, a distinct interpretation of the case of *Russell v. The Men of Devon*. The decision of the Judicial Committee of the Privy Council is directly binding on us. The case of *Russell v. The Men of Devon* exists, therefore, for us no longer as an authority on the question of liability or non-liability, except as to the mere technical difficulty of suing an unincorporated body of inhabitants.

It has been suggested, above, that a consideration of some of the conflicting authorities would result in our finding a guide by which the difficulties presented could be avoided. As such we regard the case last mentioned of *Bathurst v. McPherson*. The uncertainty as to the decision in *Russell v. The Men of Devon* is only one of several complications which it removes. The facts which there came before the Privy Council, in the appeal, are, no doubt, different in several important particulars from those arising in the present case, but the judgment specifically affirms a class of cases from which we may easily deduce a rule for our guidance here, and distinguishes another class which might have given us embarrassment, (such as *Russell v. Devon*; *Harris v. Baker* 4 M. & S., 27, and *Parsons v. Vestry of St. Matthew, Bethnal Green*, L. R., 3, C. P., 56,) in such a manner as to render them inapplicable to the case before us. Taking up that class of cases which the judgment affirms, we find the first in order to be *Henley v. Mayor, etc., of Lyme Regis*, and the second to

be that of *McKinnon v. Penson*. The passage in which these are referred to is as follows :—" Their lordships are of opinion that the plaintiffs, by reason of the construction of the drain, and their neglect to repair it, whereby a dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to indictment. This being so, their lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty ; *Henley v. M. & B.*, of Lyme Regis. In that case the rule was clearly laid down by Lord TENTERDEN. He said, ' We think the obligation to repair the banks and sea shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default, from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual as in the case of nuisance in a highway by a stranger digging a trench, etc., or by the act or default of a person bound to repair *ratione tenuræ*. An indictment may be sustained for the general injury to the public, and an action on the case for a special or particular injury to the individual.' The general rule was also enunciated by the L. C. B. POLLOCK in the case of *McKinnon v. Penson*. He said, ' There is no doubt of the truth of the general rule that where an indictment can be maintained against an individual or corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the case of a nuisance in the highway by a stranger digging a trench across it, or of the default of a person bound to repair *ratione tenuræ*.' In their lordships opinion there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported. In the case above cited of *Henley v. Lyme Regis*, Lord WYNFORD, then C. J. BEST, with reference to the liability of the corporation for the non-repair of the sea-wall, said, ' I take it to be perfectly clear that if a public officer abuses his office, either by omission or commission, and a consequence of that abuse is an injury to an individual, an action may be maintained against such public officer.' The instances of this.

are so numerous that it would be a waste of time to refer to them." The next case expressly affirmed in this judgment is that in *Hartnall v. Ryde Commissioners*, 4 B. & S., 361, in reference to which the following observations were made:—"This case more resembles the public body held liable to an action in *Hartnall v. Ryde Commissioners*, a decision which has been recognized as sound law in several late cases. It was then held that the statute creating the commissioners having expressly imposed on them the obligation of repairing the road, they were liable not only to be indicted for a breach of that duty, but to be sued by anybody who should show that, by reason of such breach of duty, he had sustained particular and special damage. In their lordships' opinion, no substantial distinction can be taken between that case and the present, in which the duty, for the reasons above stated, has been found to exist, though not expressly imposed by statute." Finally, the case of *White v. Hindley Local Board of Health*, L. R., 10 Q. B., 219, is cited for the ruling that defendants were liable, *as owners of the sewers* within their jurisdiction, for an injury which resulted from their being out of repair. Let us turn now to those cases which this judgment has "distinguished," viz., *Harris v. Baker* and *Parsons v. Vestry of St. Matthew, Bethnal Green*, in which it was held that such an action could not be brought against a surveyor of highways appointed under 43 George III., chap. 59, or a vestry appointed under the Metropolitan Local Mun. Act., 18 and 19 Vic., chap. 120. These cases are thus referred to:—

"The ruling principle in all these last decisions seems to be that it was not the intention of the Legislature to create by the particular statute a new liability, but merely to transfer existing powers, and, consequently, that if an action would not lie against the county or parish, or other superior body, it would not lie against the surveyor, functionary or other creature of that statute."

We may apply the observations in the last paragraph to the case before us by paraphrasing them thus: "If the Acts incorporating the City of Halifax, and referring to the management of streets therein, merely transferred to the corporation and its officers the powers which were formerly possessed by commissioners of streets, surveyors of highways,

or other public officers, and do not create a new liability, and, further, if in consequence of there not being, previous to the Incorporation Act, any liability on the part of the inhabitants of the place to keep the streets repaired and free from nuisance, no action or indictment could have been maintained against the county or the inhabitants, then this action will not lie against the city, but otherwise it will lie." The direct application of this principle will be presently made, but we pause here to note that, from the cases presented to us in the judgment of the Privy Council, we may deduce the following rules:

1st. That where an individual or corporation is liable to indictment for non-repair, an action will lie at the suit of one who suffers special injury.

2nd. That *liability* is not, in all cases, to be inferred from enactments which place the highway (or public work) under the control of the defendant, or which give the defendant powers in relation thereto. The obligation, (unless *ratione tenuræ*, or by usage, or in some special manner, all of which cases are beyond the scope of the present enquiry,) must have been imposed by statute, or must have been by the effect of some statute, transferred to the defendant from some other person or persons, or corporation theretofore liable.

3rd. That in respect of such liability, no distinction exists between non-feasance and malfeasance.

In applying these principles to the case in hand, we have to ascertain, (a) whether, prior to the incorporation of Halifax, there rested upon the inhabitants or any other person or persons, a liability to repair the streets and to prevent nuisances therein, and whether such *liability*, if any, has been transferred to the corporation, as well as the *powers* to make repairs and prevent nuisances, or, (b) whether by direct enactment the city has had imposed on it the obligation to repair and to remove nuisances.

A glance at the early and subsequent legislation will answer these enquiries without any research being necessary into the common law liability of inhabitants, counties and parishes.

Chapter 5 of the Acts of 1801, was an Act for repairing, keeping in repair, cleaning and paving the streets in the Town and Peninsula of Halifax, &c., &c.—(The Town and

Peninsula being the area of the present city.) It enacted that certain persons therein named should be "Commissioners for the repairing, paving, and keeping in repair, the streets, lanes and alleys in the Town and on the Peninsula of Halifax, and for ascertaining and removing obstructions therein." These commissioners were authorized to receive such moneys and perform such highway work as the inhabitants were, under former laws, or by that Act, obliged to pay or furnish "for the mending or repairing of streets, lanes, roads or highways." They were invested with all the powers, within the peninsula, of the Surveyor of Highways, whose offices and duties were similar to those of such officers in the country districts now; they had various other powers conferred on them to enable them to carry out their work, and had authority to expend on the streets one-third of the money arising from the duty collected on licensed houses, &c., on the Peninsula. Notice of action had to be given them before suit. By chapter 11 of 1809, all the inhabitants were expressly required to keep the gutters and streets in front of their premises free from nuisances of every kind. By chapter 3 of 1826, these two acts were consolidated and improved. The commissioners were continued in office, their jurisdiction was extended and their funds increased. The provisions obliging the inhabitants to keep the streets free from nuisances were re-enacted, and the following new enactment was made: "It shall * * be lawful for the commissioners to order * * the inhabitants * * as often as they shall deem necessary during the winter to work on the public highways with their horses, oxen and sleds, in order that the roads may be rendered passable, * * provided no inhabitant shall be required to furnish more than one day's labor of himself and cattle for any one fall of snow, or to work in any case where a fall or drift of snow shall not exceed twelve inches." Chapter 9 of 1832, gave these commissioners borrowing powers. In 1841 the city was incorporated by chapter 55 of the Acts of that year, and section 67 of the Act gave to the Mayor and Aldermen and Council the exclusive power to regulate the repairs, &c., of the streets and to appoint commissioners of streets for the city, and it was provided that the commissioners so to be appointed should have all the authority conferred on the commissioners by the

Acts before referred to. Authority was also given to assess for repairs of streets. Consolidation Acts followed in 1848 and 1849, but these provisions were continued. In 1851 there was another Consolidation Act, but it did not alter the provisions last enumerated. Chapter 36 of 1853 provided that there should annually be chosen a superintendent or superintendents of streets, whose duty it should be, under the direction and control of the City Council, to superintend the general state of the streets within the whole city * * and "to attend to the * * repairs of the same * * and to give notice to the Mayor or City Marshal of any nuisance therein." All the powers and duties of the commissioners of streets were transferred to the new officers subject to the aforesaid direction and control. Chapter 39 of 1861 enacted that all sums required for the street service should be borne by and taken from the general revenues of the city; it placed the streets and expenditure thereon under the control of the street committee, who should have the direction of the superintendent of streets, and it also gave to a committee of three Aldermen, "to be called the Internal Health Committee," the duty of attending to sweeping, cleaning and watering the streets of the city, clearing away snow, and other like duties. Chapter 81 of 1864 was the last Consolidation Act, sections 264 and 265 provide that the City Council or their committee shall "remove all encumbrances on the streets * * and cause to be observed the laws touching streets and bridges, or the work to be performed thereon, and shall cause the streets * * to be cleaned, repaired, etc., as they may deem proper." The early enactments obliging the inhabitants to keep the streets before their properties free from nuisances were re-enacted, and the committee of streets were armed with power to compel their observance. The authority of surveyors of highways was given to the City Council, and the provisions of the Act of 1853, in reference to the superintendent of streets were substantially re-enacted, as also those of the Act of 1861, in reference to the committees of streets and of Internal Health. By chapter 34 of 1872, all business connected with "the making and repairing of the streets and street expenditure * * and all duties connected with * * clearing away snow and other like duties," were placed under the control of the

Board of Commissioners of City Works, as established by that Act, consisting of six Aldermen, and it was declared by sec. 3 to be the duty of such commissioners to do all things which should be necessary, connected with, (among other things), the street service. The commissioners were given power to appoint all necessary officers and were clothed with all the powers and authority of the former committees of streets and of Internal Health. By section 8 of chapter 36 of 1877, the City Council were, and still are, obliged to set aside, for the service of streets, a sum not less than \$25,000 annually, and this is made a first charge on the city revenue. These enactments may then be summarized as follows:—

The Acts of 1801, 1809, 1826 and 1832, established a Board of Commissioners, whose duty it was, amongst other things, to keep the streets of the Peninsula in repair, out of funds which were thereby provided for them. The burden of keeping the streets free from nuisances was expressly imposed on the inhabitants, with particular reference to the making of highways passable after snow-drifts. The Act of 1841 enabled the City Council of the city, then incorporated, to appoint the commissioners. The Act of 1853 transferred the powers and duties of the commissioners to the City Council and to their superintendents. The Act of 1861 made the streets expressly chargeable to the city revenues generally, and transferred all powers to committees of streets and of Internal Health, with special reference again to the clearing away of snow, etc. The Act of 1864 again imposed explicitly on the city the duty of cleaning and repairing the streets, and re-enacted the clause of 1809, with reference to the duty of the inhabitants. The Act of 1872 transferred the powers and duties of the committees of streets and Internal Health, to the Commissioners of Works, who should "do all that might be necessary in connection with the street service." The Act of 1877 made \$25,000 a year for streets a first charge on the city revenues.

These references appear to us to furnish the answers to the two questions which were propounded just before the citations from the statutes commenced. They appear to show that, before the incorporation of Halifax, there rested on the inhabitants, the obligation to keep the streets free from

nuisances, and to clear away the snow which might form an incumbrance, and to furnish labor and money to the commissioners of streets, who were charged with the duty of seeing these obligations performed, and of making all necessary repairs on the streets; they appear to show likewise, that while the obligations, (after the incorporation of the city,) were kept virtually intact, the powers of enforcing them, the duty of seeing them carried out, and the means of supplementing them by labour and money were given to the City Council and its officers, who were commanded to do all necessary repairs, prevent nuisances, clear away snow, etc., etc., in the highways of the city.

We think there can be no doubt that the plaintiff sustained such special injuries by the non-repair as will entitle him to maintain his action, notwithstanding that what he complains of was also a general public nuisance. The authorities already cited sustain him. In none of those cases was the injury to the person who was held entitled to recover of a more special and particular nature than that complained of here. Some Ontario cases were cited on behalf of the city, but they turned upon the circumstance that the facts in proof did not establish negligence on the part of the municipal authorities, but in none of them was it denied that a liability might have been established if the defect complained of had been existing by the clearly proved negligence, or refusal to repair, of those authorities; they were, rather, cases in which mere accidents on the highway, resulting from small, and, perhaps, unseen defects, had to be considered. Any decisions which would go beyond this, and deny the right of a plaintiff to recover under such circumstances as we have here, would be opposed to the English authorities, in which, we take it, the law is well settled. There are decisions, both in Ontario and in the United States, to shew that in cases of this kind, and in cases far less plain, municipal authorities have been held bound, on common law principles, even to remove obstructions and inequalities in the ice and snow on the highways which are calculated to render transit unsafe, but their citation here is deemed unnecessary.

We have, however, still to consider the contention made by the Recorder that the amount of work which would have been requisite for the removal of the nuisance in

these streets was so great, in consequence of the extent of the evil, and the likelihood of its rapid recurrence that it was unreasonable to require its removal—that, in fact, it would be unreasonable in this climate to expect the removal of snow and ice; that this was a case of *vis major*, and that the question of reasonableness should have been left to the jury. A review of the evidence is necessary to the due application of this argument. The evidence on the point may be summarized as follows:—

Plaintiff—"It began to snow about 10th January last, and the roads began to get bad about the 20th. The snow began to get very deep, especially on Lockman street, from North to Cornwallis. They became pitchy, caused by snow thrown from the sidewalks in hills into the middle of the street. At most of the storms last winter there was more or less drift. * * In February the streets became worse. A heavy drifting storm early in January. Snow fell, more or less, in drifts. It did not drift much on Lockman street, which is narrow, but it became very bad, with deep pitches, in consequence of the snow being thrown off the sidewalks. Granville and Hollis streets were also very bad and pitchy. One pitch I measured was four feet deep. * * Lockman street roadway became so narrow that passing vehicles collided with and tore each other. * * When I knocked off work in March, 1882, the pitches were still deep, and it became impossible to draw the 'busses in consequence of the depth and width of these pitches. I have seen the 'busses stick in the holes and the passengers have to get out to enable us to get the 'bus out of the hole. The streets began to get very bad after the 20th January. I gave notice at the Board of Works. * * I met Alderman Graham, the acting chairman. * * This was 21st January. I asked him if he could not put on some men. * * He refused. * * I told him the street was going to get worse and that I would hold the city responsible for whatever loss I should sustain. He replied, it was the best thing I could do. On 11th February, '82, I went back. * * The streets had got worse and the city had done nothing to repair them. * * I was obliged, on the 22nd of February, to take the 'busses partially off the road. * * I counted over one hundred bad pitches. * * These streets could have been

made safe for travel by cutting down the pitches and filling in the holes. * * Along the 1st January, I saw the 'bus going into a pitch and smashed. * * Have been able to run the 'busses in all weather till last winter."

Edward O'Brien.—"About the middle of January the roads through which I drove were pretty bad—deep snow, heavy pitches, etc. * * A hundred or more pitches. For a couple of weeks the roads remained in this condition without repairs. The bad roads lasted until the end of March. * * The worst time was from the latter part of January till about the middle of February. * * I don't think any repairs were made till February. There were some days we could not work at all."

John McGill.—"Road very bad about the end of January."

Jonathan Adams.—"No work was done by the city to repair the road for a month after the drifts. It was after January before they began to level at all. If the drifts had been levelled off after the storm there would have been no pitches at all."

The only evidence to meet all this was that given by the Overseer of Streets.

John McDonald.—"I worked on these streets for the City last winter, in January and February, cut snow banks and levelled them, we continued this as long as there was any snow on the ground, and it was dangerous to the public. Cutting down snow and filling up pitches made road passable and better, but teams coming along dug them out again and we had to keep the men at it all the time. Somewhere about \$1,000 spent in this way last winter on the streets named. I do not remember the particular dates of the work done."

Reasonableness is, of course, a relative term, depending for its meaning on the populousness of the district, the fund at the control of the municipality, the duration of the nuisance, and its cause. The law about reasonableness in relation to repair needs no extensive citation of authorities to illustrate it. It is the expression of such a rule as common sense would suggest, and is given at a glance in the collection of cases quoted in the notes to section 491, in *Harrison's Municipal Manual*, 4th ed.: "In determining the question of non-repair the nature of the country, the character of its roads, and the

care usually exercised by municipalities in reference to such roads, must all be taken into account. * * A new side line, or concession line, opened in a township thinly scattered, could scarcely be expected to be found in as perfect a condition as an old highway in a well settled township. It must be a question of fact altogether for a jury to say whether the place alleged to be out of repair is dangerous, and, if so, from what cause, and, if from a natural cause or process, whether the persons liable to repair the roads could reasonably and conveniently, as regards expenditure and labor, have made the road safe for use." We quote for the sake of brevity this note, as the propositions of law involved in it are simple and almost beyond dispute. How then stands the contention as to the manner in which the case should have been submitted to the jury. It was the case of a closely settled city, the highways in question were its principal thoroughfares, the non-repair existed with but slight cessation for more than two months, it was occasioned partly by heavy falls and drifts of snow, and was partly the result of constant travel, and partly the result of snow being thrown from the sidewalks and allowed to remain as an obstruction to the street-way, the non-repair existed, during the period mentioned, to the knowledge of the authorities, one of whom told the plaintiff that the best thing he, (plaintiff), could do was to look to the city for damages, and that the work required could not be done—the non-repair gradually developed from all the causes stated, and made the streets, if plaintiff's witnesses are to be believed, dangerous in the highest degree, to the property and limbs of travellers. Before we look for exonerating evidence let us premise that for the needed repairs the city had apparently a large fund. The expenditure of \$25,000 had been made compulsory, the expenditure of a further sum, whatever might be needed indeed, out of a revenue of about \$100,000 was authorized. No witnesses appeared for the defence; but the case thus made out is met, it is alleged, by the evidence of John McDonald, who might, from his position, have been expected to have given some definite testimony, but who does not, or cannot say how many men were employed on the dates at which any work was done. He, himself, worked on the streets in question in January and February; for anything

that appeared, the January work may have been done before the date at which the plaintiff began to complain. He alleges that during the whole winter about \$1,000 was spent on the streets named. The jury were not told what proportion of this was expended during the period in which the nuisance was alleged to exist, and as plaintiff's witnesses had admitted some repairs being made during the season, McDonald's evidence, so far, did not amount to a denial or an explanation of the plaintiff's case. Then he says, "cutting down snow and filling up pitches made road passable and better, but teams dug them out again, and we had to keep men at it all the time." It may be that a better remedy would have been the cutting out of the hard snow and ice which formed the hillocks rather than the throwing in of soft snow, to be added by the motion of passing vehicles to those obstructions; the City might have been expected to prove, at the very least, that the very little that was done was suitable in kind, if not in degree. From what this witness said it would seem to have been admitted, that, without some levelling, these streets would have been impassable, and that the authorities were content with making them passable only, and leaving them still in such a condition that in a little more than two months of travel, the plaintiff suffered casualties to a very heavy amount, the jury awarding him \$600, and the verdict not being complained of as too large.

In reference to the effect of snow generally on our highways, and the obvious unreasonableness of requiring its total removal, a good deal was said at the argument, in consequence of some general remarks occurring in the judgment in *Caswell v. St. Mary's, &c., Road Co.*, 28 U. C., 247. The facts of that case were, however, held to warrant a verdict against the Corporation, and they were not nearly so strong as the facts are here. No one can suppose that the entire removal of the snow would have been necessary or even proper. The plaintiff explains how he made repairs at his own expense, which were effectual, and the evidence shows that a levelling and keeping level of the highway, to the extent of cutting off and keeping cut about a hundred hillocks of ice and snow was what was required, even after matters had got to their worst. Nothing further then need be said as to such work being

unreasonable in this climate, excepting that it may be proper to recur to the fact that for nearly three quarters of a century enactments had existed, expressly making it a duty of the inhabitants and officers of the place to remove such nuisances by making the streets passable after snow, and by clearing away snow. Nor can it be reasonably contended that this was a case of *vis major*. The extent and prevalence of the evil were chiefly attributable to neglect and delay. The Recorder excepted to that part of the learned Chief Justice's charge, in which the duty of the City was illustrated by reference to a ditch or cutting in the street, caused by a freshet, and suggested that this was more like the case of a great length of highway, being rendered unsafe by a convulsion of nature. The latter illustration is surely inapplicable, because the nuisance was occasioned largely by the traffic and business of the inhabitants, it was not due to unforeseen causes, nor was it sudden in its occurrence. On the contrary, as we have just been told, the inconvenience was one which might happen during any severe winter, unless provided against by labor applied in due time, and at proper intervals. In fact the long continuance of the inconvenience is the gravamen of the offence, and removes this from the category of accidents of the kind suggested. It must be conceded that the question of unreasonableness is a question for the jury—but, like all other matters which are for the jury, it is only to be submitted to the jury if any question regarding it arises under the evidence. Here the evidence on this point was all one way; a verdict for defendant, proceeding on the ground that the repairs which plaintiff contended should have been made, could not reasonably be required, would have been against the weight of evidence, even if it should not be deemed equivalent to a decision that the law was unreasonable. If such a verdict could not be sustained how can the defendant complain that the jury were not told that they were at liberty to find it? In an action on a promissory note, the question as to the making of the note is for the jury, but, if the evidence of the making should not be contradicted, the Judge would surely be right in telling the jury, as he told this jury, that the plaintiff was entitled to their verdict, if they believed the evidence. When a corporation is bound to repair a highway,

and deliberately leaves it out of repair, to such a degree that it is dangerous, the Corporation is indictable, according to all the authorities, and if any individual, under such circumstances, suffers a particular injury, then, according to the cases above cited, an action will lie, whether the jury think the liability reasonable or not. If a case of sudden injury to the way, or accident from a non-apparent cause had presented itself, probably the question of reasonableness as to the time allowed for repairs should have been submitted to the jury. If the Legislature had not allowed sufficient funds, the reasonableness of the extent of the requisite repairs might be questioned. If there was a doubt here as to the City officers having had notice of the non-repair, the reasonableness of the notice might have to be submitted, but none of these elements, nor any like them were presented at the trial. We think, therefore, that the learned Chief Justice properly put the case as depending on the evidence for the plaintiff, and that when he put it as a case analogous to that of injury caused by a freshet, he was putting the case very favorably for the defendant. In such a case the question of reasonableness might arise from reasons which do not exist here.

II. Having thus dealt at length with all the views presented in reference to the liability of the corporation in a suit of this character, we have now to consider whether the plaintiff is, as the pleadings allege, and as was contended at the argument, under any disability as to the bringing of this action. The disabilities charged were threefold :

- 1st. Contributory negligence.
- 2nd. Want of license for his omnibusses.
- 3rd. Want of sufficient notice of action.

The contributory negligence alleged was in plaintiff's continuing to ply his vehicles in these streets, with knowledge of the dangers involved, instead of sending his omnibuses by other streets. We have no evidence of the condition of the other streets, nor even any evidence that he could get by other streets to the termini between which he carried on his business. The objection does not go to the whole cause of action ; the plaintiff has recovered in part for the diminution of his receipts, caused by passengers abstaining from riding in his vehicles in consequence of the danger and unpleasantness

of locomotion over such highways. In view of the last-mentioned feature the defendant should, before relying on his objection, have shewn that the business of the plaintiff could have been carried on with as much profit in other streets. The plaintiff, presumably, had a legal right to use the streets in question; he had established a time-table for those streets, and given notice to that effect, it was his business to run his omnibuses on those streets, and his profits doubtless arose, not merely from carrying passengers from end to end of the city, but also from carrying them between immediate points which might not be accessible from other streets. Holding the views which are expressed above, as to the liability of the corporation to make repairs, we can hardly be expected to say that rather than incur the risk of depreciation in his receipts and the necessity for a large outlay for repairs, the plaintiff should have ceased his business, or have sought to carry it on in other streets, of which the evidence tells us nothing. The point as to contributory negligence, moreover, was not taken at the trial.

2nd. The pleas allege, in reference to licence, (10th plea), that plaintiff did not carry on his business under license granted by the defendant pursuant to the ordinances of the city as alleged. Also, (11th plea), that he held no license from defendant. Also, (12th plea,) that plaintiff had no license or permission from defendant or the City Council of Halifax to drive for hire the omnibusses, &c., mentioned. Also, (13th plea), that plaintiff had no license or permission from the defendant or the City Council to drive these omnibusses, &c. and the same were being driven contrary to law. Also, (14th, plea), that the horses alleged to have been injured were attached to and employed in drawing an omnibus, &c., for hire in said city, and plaintiff had no license from defendant or the City Council to drive to same, and the same were being illegally and improperly driven in said streets.

The plaintiff, in consequence of these pleas, gave evidence as follows:—"Have a license as 'bus driver from the city. This is the license (put in and read, J. McD., 1.) Paid for it \$25.00 to Clerk of License. * * My 'busses have my name on all of them—'Walker's Line.' I am not sure if all the sleigh 'busses are numbered. I think the white 'busses are. They

have the same words on them. There were no other words printed on them but 'Walker's Line.'" The exhibit J. McD., 1, contains a copy of extracts from the City Charter, also a copy of what purports to be an ordinance of the city concerning hackney carriages, &c., passed 20th December, 1876, and a license in these terms :

" HALIFAX, N. S., July 5th, 1881.

" License is hereby granted to James Walker, until the thirtieth day of April, 1882, to drive five omnibusses, Nos. 1, 2, 9, 10 and 15, as annexed, in the City of Halifax, he complying with the City Charter and the By-laws and Ordinances of the City, made or to be made, relative thereto. July 23rd, paid \$25."

No objection was taken as to the license not having been duly obtained, but it is said that an ordinance of the city provides that each licensed omnibus shall have printed thereon its licensed number and the names of the streets through which it is to run, as designated in the license. When we enquire where the proof is of such an ordinance, we are referred to the exhibit No. 1. The only ground for contending that this is evidence of the ordinance is that the license authorizes the plaintiff "to drive five omnibusses, Nos. 1, 2, 9, 10 and 15, as annexed, in the City of Halifax, he complying with the City Charter and the By-laws and Ordinances of the City." There is some difficulty in making the words "as annexed" applicable to the ordinances printed as a preface to the license, or, indeed, in saying what these words refer to. If they refer to the printed copy of the ordinance, there may be a question whether the ordinance must not still be proved to be such, especially as the license goes on to make express reference to the ordinances of the city, as though the words "as annexed" referred to something else. This Court has held that even though a paper put in evidence carries an endorsement on it, the facts stated in the endorsement, if they are relied on, or the authenticity of the endorsement, if that alone be relied on, must be proved; *Gould v. McGregor*, 1 R. & G., 339, and *Caldwell v. Stadacona Fire & Life Insurance Co.*, 1 R. & G., 259. But without insisting on such strictness of proof, in reference to such a very strict objection, let us see how the evidence supports the

objection: the omnibusses or sleighs in question bore no words but "Walker's Line." They are required to carry numbers, and it is not proved that they did not carry these. The only words required were the names of the streets through which they are to run, *as designated in the license*. The streets are not designated in the license. But the Recorder suggested at the argument that exhibits 1 and 2 had been annexed originally, and were so at the trial. If so, the words "as annexed" would plainly refer to exhibit 2, in which the time table, and names of streets occur. This is the only way in which the names of the streets can be ascertained, and if we can thus get exhibit 2 incorporated with the license, under the words "as annexed," we must abandon the ordinance in exhibit 1, as referred to in these words, and thus, while we get the names of the streets, we have no proof of the ordinance which requires those names to be put on the vehicles. There is another conclusive answer to this objection. The existence of the alleged ordinance and the plaintiff's non-compliance with it have not been pleaded. The pleas quoted can hardly be considered as doing more than putting in issue the existence of the license. If we could construe them as denying that plaintiff carried on his business according to the ordinances of the city, the pleading would still fall short of what would be requisite for the purposes of this objection. It would be like pleading to a policy of insurance, that the plaintiff could not maintain his action by reason of the conditions to which the policy was subject, without stating the conditions relied on, and the facts alleged to be fatal under the conditions. See *Caldwell v. Stadacona Fire and Life Insurance Co.*, *supra*. The plea should show a valid ordinance, and a breach thereof in some specified particular, and should show, unless that can be made to appear without allegation, as matter of law, which we very much doubt, that the license was invalid by reason of such default, or that the plaintiff had not, for some reason the benefit of the license in consequence of such default.

III. The Recorder took several exceptions to the sufficiency of the notice of action given under section 276, chap. 81, Acts of 1864. He claimed that it should not have been given by the attorney of the plaintiff, but by the plaintiff himself. The Act is indefinite on this point, and we can find

no authority for the proposition that, under such enactments, the notice may not be given by an attorney, or agent duly authorized, as the attorney was proved to have been in this case. The decision cited was one in which the notice was held bad because the attorney gave it, not only in the name of the plaintiff, but also in the name of another, who was not joined as co-plaintiff, and who was dead at the time. Then it was contended that the notice was bad because it was in the alternative. The cases cited under this head were cases in which the notices failed because they intimated that action would be brought, unless the persons addressed should comply with some demand which the demandant was willing to accept in lieu of amends, as, for instance, to divulge names, to construct some work, to apologize, &c. Here the notice was that action would be brought unless amends should be paid; and as that is precisely what the legal meaning of the notice is, and what the notice is for, we cannot hold it to be bad on that account. In the absence of further authority we think that the notice could not be complained of as being indefinite.

The rule *nisi* to set aside the verdict must be discharged.

SYMONDS v. BECKETT ET AL.

Before McDONALD, C. J., and SMITH, and WEATHERBE, J J.

(Decided July 14th, 1883.)

Service after six months.—Irregularity in moving to set aside.

WHERE a writ of summons was served more than six months after issue, and the defendant entered into negotiations for a settlement with knowledge of the service, and did not apply to set it aside for several weeks.

Held, that the application was too late.

Appeal from the following decision of McDONALD, C. J., at Chambers, discharging, with costs, a rule to set aside the plaintiff's writ of summons, and all proceedings thereunder:

This was an application to set aside the writ of summons and service thereof on the ground that the service was made more than six months after the issuing of the writ. I think the defendant is not now in a position to avail himself of any irregularity in the service of the writ. It appears from the



affidavits that the proceedings in the cause, including the attachment of assets in the hands of defendant's agents, came to his knowledge, and he entered upon a negotiation for settlement with the plaintiff several weeks before this application was made. The defendant does not, in his affidavit, deny knowledge of the writ or its service, and, under the facts disclosed in the affidavits, and in view of the delay and want of promptitude in making this application to set aside the proceedings it must fail.

J. J. Ritchie, in support of appeal.—The application is to set aside the summons, the service, &c., under the Practice Act, section 42, on the ground that the writ was not served within six months, as imperatively required. Cites sec. 2, chap. 97, *Revised Statutes*. The statute rendered the service of the writ within six months imperative. After that time the writ was a nullity. (McDONALD, C. J.—If that is so, my judgment was wrong. I treated it as an irregularity.) If it was an irregularity there was no waiver. As to effect of the word “shall” cites *Maxwell on Statutes*, 334; *1 East*, 71. The word here is clearly peremptory. The writ, not having been served in accordance with the statute, and the proceedings being statutory, the Court has no jurisdiction. There was no laches. Our first order was discharged for irregularity, and a second order granted on the same day and moved ten days afterward. (McDONALD, C. J.—What affected me was the negotiations.) They took place before the rule was granted. Our statute does not apply to a company incorporated out of the Province; at all events there must be a proper service. The appearance put in was of different persons from those constituting the company. Section 26 of the Act provides for the service on a foreign company in a particular way. It recognizes that without the statute the company could not be served at all. The appearance is only for several of the defendants omitting others, and not properly describing those for whom the appearance purports to have been made.

Borden, contra.—The words “writ of summons” in chap. 94, *Revised Statutes*, sec. 42, do not apply to the writ in this case, either as regards the writ or the service. The sheriff's return is not sufficient to rebut the presumption that the writ

was properly served. There should have been an affidavit that the writ was not left at the defendant's last place of residence within six months.

J. J. Ritchie.—The statute never intended that the original summons should be served on the agent who is not really an agent, but a debtor. There is no agency between them. There is nothing to show that section 42 does not apply. It cannot be said that this is not a writ of summons. It applies *prima facie* in all cases. The Absconding Debtors Act adds another remedy. The Practice Act refers expressly to absconding debtor process which it includes in the class of writs by which personal actions are to be commenced. It also gives the form of the writ. The words "service of the writ" apply to the writs previously spoken of

WEATHERBE, J., (July 14th, 1883.)—The defendant must fail on the ground of laches.

PURDY v. MATHERS.

Before McDONALD, WEATHERBE, and THOMPSON, J. J.

(Decided July 14th, 1883.)

Judgment of County Court sustained on weight of evidence.

IN an action of trover for deals, the fact of conversion by defendant rested on evidence of the freight-deliverer that the deals were delivered to one McA., who acted as agent for defendant, as well as for DeW., to whom they were addressed by plaintiff; that it was his duty to know who were the charterers of the vessels being laden at the wharf where the deals were delivered, and that he knew that in this instance DeW. did not get the deals, but that McA. checked them from the cars and into vessels for the defendant.

Held, that the County Court Judge was right in refusing to non-suit the plaintiff.

This was an action for the conversion of a car load of deals shipped by the plaintiff, per the Intercolonial Railway, in July, 1877, addressed to J. L. DeWolf & Co., Richmond. Shortly after the arrival of the deals at Richmond, the name of defendant was substituted for that of J. L. DeWolf & Co., by officials in the Railway Department, and the deals were delivered to defendant, who paid the freight thereon. Defendant pleaded a purchase from one F. W. Bent, whom he alleged to be the agent of the plaintiff, and entrusted with the possession of the deals as apparent owner. Also, that after the cause

of action, if any, arose, and before the writ was issued, the plaintiff's claim was satisfied and discharged by said F. W. Bent, who made and delivered to the plaintiff his certain negotiable note, bill or obligation in writing in full satisfaction and discharge of the plaintiff's claim.

The cause was tried before MORSE, County Court Judge at Amherst, who declined to non-suit and gave judgment in plaintiff's favor. A rule was granted to set the judgment aside, which now came on for argument.

J. J. Ritchie, in support of rule.—Outside the books of the Railway Department there is no evidence of conversion. The evidence of Forrest is worthless, being founded on hearsay. The Judge has found against it. The Order-in-Council, under which the books were alleged to have been kept, was never produced.

Borden, contra.—Official books kept in this way are admissible in evidence; *Taylor on Evidence*, 1326; *Starkie on Evidence*, pp. 177, 161, 156, 496, 671; *Greenleaf on Evidence*, vol. 1, secs. 483, 484; *Phillips on Evidence*, 4021, 611, 403, 412; *6 Esp.*, 48; *2 Bing.*, 396; *5 Esp.*, 117; *1 Strange*, 93; *2 Esp.*, 428.

J. J. Ritchie cites section 70, chapter 12, *Acts of 1867*. Assuming the Order-in-Council to have been proved, cites *3 Chitty's Statutes*, p. 1157; *8 A. & E.*, 179. (THOMPSON, J.—I don't think any of these documents are evidence, if the entry is the matter in issue. They are evidence in a collateral matter.) Entries to be admissible must be of a public nature, kept for the benefit of the public, and open to inspection of the public.

Graham, Q, C.—McDonald's evidence as to the books and the rules under which they are kept, is sufficient, not being objected to. (McDONALD, J.—All McDonald's evidence is objected to.) Forrest's evidence is enough for the jury to find a verdict on.

THOMPSON, J., now, (July 14th, 1883,) delivered the judgment of the Court:—

On the trial of this action, (trover,) it appeared that the plaintiff, in July, 1877, bought a car load of deals, which he

sent by the Intercolonial Railway from Atkinson's Siding to Halifax, directed to T. L. DeWolf & Co. The number of the car was 4670, and it came to Richmond on the 12th or 13th of July. The car-checker, under instructions from the Station Master, changed the entry in his book concerning this car in such a way as to make it appear that the defendant was entitled to have delivery of the deals instead of DeWolf, and this officer, in pursuance of what he believed, (correctly, no doubt,) to be the purpose of this change, and in compliance with further orders from the Station Master, delivered the deals to W. McAndrews, for the defendant. The car-checker is the freight deliverer. He testifies that it is part of his duty to know who is chartering vessels loading at Richmond with deals, received per Intercolonial Railway, as these were; that McAndrews acted for both DeWolf and Mathers in receiving deals and checking them, as they were laden in their respective vessels; that he has seen both DeWolf and Mathers present when McAndrews was so acting for both; that, in this instance, McAndrews was acting for defendant, checking the deals from the cars into vessels; that DeWolf was not then getting deals from Atkinson's Siding; that DeWolf refused to receive these deals. He states, it is true, that he then and always delivered to McAndrews, on that person's representation that he had authority to act for the one or the other; but, we think there was some evidence that McAndrews had authority from DeWolf and from Mathers, by the fact of his taking delivery of deals for both, and in the presence of both, attending to the loading of them on board their respective vessels. We think, further, that in face of the positive statement of this witness, that DeWolf did not get these deals, but that McAndrews was checking them, from the cars and into vessels, for the defendant, a fact for which he was not dependent on the statement of McAndrews, because, he alleges, that it was part of his duty to know who the charterers of the vessels so being laden were, the learned Judge below was right in declining to nonsuit the plaintiff, even if he laid out of consideration, as he probably did in coming to this conclusion, the evidence derived from the books of the Railway Department.

The appeal should therefore be dismissed.

LOUISBURG LAND COMPANY v. TUTTY.

Before McDONALD, C. J., and SMITH and JAMES, J. J.

*(Decided July 14th, 1883.)**Adverse possession to defeat Crown grant must be twenty years — Lien of judgment on after acquired property.*

In 1867 the Crown granted to one Scott a lot of land, of which defendant had been in adverse possession for ten years, and in 1870 Scott conveyed said land to defendant by deed, which was duly recorded. In May, 1857, plaintiff recovered judgment, which was duly recorded, against Scott, under which the land in dispute was sold, and purchased by plaintiffs at the Sheriff's sale.

Held, that the adverse possession of defendant did not prevent the Crown from granting the land to Scott, as such possession, in order to have such effect, must be defined actual and continuous for *twenty years*; and that, although Scott's deed to defendant was duly recorded, the land, although acquired after the judgment recorded in 1857, was bound by the judgment the moment it was granted to Scott,

This cause came before the Court on a rule to set aside a verdict for defendant in an action of ejectment brought to recover possession of a lot of land at Louisburg, C. B. Defendant went into possession of the land in question in April, 1857, under an agreement for purchase from one Scott, and continued to occupy down to the time of action brought. In January, 1867, Scott obtained a grant of land from the Crown, including that in dispute, and in October, 1870, made a conveyance to the defendant of the land previously sold to him. In May, 1857, a judgment was recovered against Scott by Allison & Co., which was duly recorded, and in July, 1877, the lands bound by the judgment, including that claimed by defendant, were sold under execution by the Sheriff, and a conveyance thereof made to the plaintiffs as the highest bidders.

Borden, in support of rule.—The Crown can grant land in the possession of a subject unless the latter has had continuous unequivocal adverse possession for at least twenty years; *Smith v. McDonald*, 1 Old., 274. This was under the statute of James I. If it had not been for that statute sixty years possession would have been necessary; *Vostin v. Chappel*, 1 R. & C., 40. In this case one of the grants was upwards of twenty years, but the possession was not continuous; *1 Pugsley*, 200. *8 U. C., Q. B.*, 313 goes further still as to the necessity of continuous possession; *24 U. C., C. P.*, 230. The grantee

of the Crown can bring trespass at once, and need not wait to bring ejectment; *Rob. & Joseph's Dig.*, 965. We trace our title directly to the Crown and through the judgment. The defendant's possession is, as it were, wiped out by the grant of the Crown. It was not plainly enough put to the jury that the Crown could grant without office found.

Henry, Q. C., contra.—The Act of 1874, *Revised Statutes*, 4th. Series, chap. 79, sec. 22, applying the effect of a judgment to after acquired property, is a new and not a declaratory act. In the third series, and until the fourth series, the judgment did not bind after acquired land. Scott had no lands to bind at the time the judgment was entered up, nor until ten years after; and the plaintiff claims under the judgment against Scott. There is neither presumption nor positive evidence of when the judgment was registered. The Sheriff's deed is a presumption that everything that should have been done was done, but it is no evidence of the date of registry of the judgment. The Court cannot assume that the judgment was registered previously to the deed of 1870, under which we claim. The Sheriff's deed only shows that the defendant's title is conveyed. It does not even prove that he had any title. Least of all does it prove that the judgment was recorded. The recording of the judgment did not enable the title to be conveyed.

Borden, in reply.—Notwithstanding the fact that it was not so stated in the third series, the judgment against the defendant does bind future acquired land. The Registry acts only aid the common law. The land is bound independently; *Freeman on Judgments*, p. 388, sec. 367; p. 389. The registry of a judgment is analogous as to real estate to the operation of an execution on personality; *Freeman on Executions*, sec. 367; 16 *U. C.*, *Q. B.*, 495.

MCDONALD, C. J., now, (July 14th, 1883,) delivered the judgment of the Court:—

Ejectment for a lot of land situate at Louisburg Harbor, in the County of Sydney. The defendant disclaiming for all else defends only for the portion of the land claimed, as described in his plea. It appears that, previous to the year

1857, one Malcolm McDonald was in possession of, or exercised acts of ownership over the lots in question, and transferred his rights, whatever they were, to one John Scott, who sold, or agreed to sell to the defendant, Tutty, in April, 1857. The defendant, in his evidence on the trial, swore: "The part I claim I have held in possession ever since 1857." On the 15th January, 1867, the Crown granted to John Scott certain lands in the County of Cape Breton, including that in dispute in this action, and on the 20th October, 1870, Scott conveyed to the defendant the land purchased by him from Scott in 1857. On the 14th May, 1857, Allison of Halifax recovered judgment against Scott, which was duly recorded in Cape Breton County on the 19th of the same month; and on the 5th of July, 1877, the lands of Scott, including those conveyed to the defendant, were sold by the Sheriff of the County of Cape Breton under execution issued on this judgment, and a deed was given by him to the plaintiffs, as the highest bidders, according to the statute. It was contended at the argument that the grant from the Crown passed no title to Scott, as the defendant was, at the time the grant issued, in adverse possession; but, at the most, the possession of the defendant previous to the grant to Scott did not extend over a longer period than ten years, and it seems to be settled that in order to prevent a Crown grant from taking effect on that ground, the possession must be "defined actual and continuous for twenty years." In this case I think the land in question passed to Scott by virtue of the grant. By chap. 79, sec. 22, 4th Series, *Revised Statutes*, it is enacted that "a judgment duly recorded and docketed, &c., shall bind the lands of the party, &c., from and after the registry thereof in the county or district in which the lands are situated, as effectually as a mortgage, *whether such lands shall have been acquired before or after the registry of such judgment.*" The words italicised are in amendment of the law as it stood previous to the 4th Series, *Revised Statutes*.

As I have said, Scott conveyed the land in dispute to the defendant on the 20th October, 1870, when the deed was duly recorded; and it was contended that, under our statute, the registration of the judgment of Allison would not create a lien on after acquired property, and that, as the deed from

Scott to the defendant was recorded before the issuing of the execution on the Allison judgment and the levy and sale thereunder, the Sheriff's deed conveyed no title to the plaintiff of the land defended for. We are all of opinion, however, that as soon as the grant passed to Scott the land became subject to the lien of the then existing judgment, which, by the registry, became a charge upon the land, and that when the execution issued upon that judgment it had relation back and defeated the conveyance from Scott to defendant. The rule for a new trial will be made absolute with costs.

FOYLE v. BINGHAM.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided July 14th, 1883.)

Suit by a partner against co-partner.

On the dissolution of a co-partnership between defendant and plaintiff, defendant agreed to assume the liabilities of the firm. Plaintiff and defendant were sued jointly by one of the partnership creditors. Defendant agreed with plaintiff that the latter should pay the debt, and that he would repay him the whole amount. Plaintiff paid the debt and sued defendant *in assumpsit*.

Held, that plaintiff could recover, notwithstanding the former relation of partnership.

This was an action on the common counts tried before SMITH, J., at Baddeck, C. B., without a jury, when a verdict was entered for plaintiff by consent, with leave to the defendant to move to set the verdict aside, on the ground that the debt sued for was a partnership one, and that there should have been an accounting. Plaintiff and defendant had been partners and had dissolved, defendant assuming the liabilities of the firm. After the dissolution, of which notice was given in the papers, an action was brought against plaintiff and defendant for a partnership debt. Plaintiff paid the debt and sued defendant for the amount paid, defendant having agreed with plaintiff that he, (plaintiff,) should pay the debt, and that the defendant would repay the whole amount.

Borden, in support of rule.—The burden is on plaintiff to show that the partnership accounts were settled in order to entitle him to sue.

A. McDonald, contra.—The notice containing the terms of dissolution, by which defendant assumed the liabilities, is admitted. There was no necessity whatever for any further agreement. 23 *American Reports*, p. 90; 24 *American Reports*, 529; *L. R. 16 Equity*, 60; 1 *Marshall*, 603; 4 *Cl. & Fin.*, 207. The question as to whether there has been a settlement or not, is for the jury. The evidence was that the notice contained the terms of the settlement. The finding is for the plaintiff.

Borden, in reply.—The cases cited appear to be cases in which there has been a final settlement and a covenant by one of the parties to pay debts. No case has been cited that where, under an agreement, one party agrees to pay debts, and the other party pays, the latter can recover the whole amount. There is no evidence that defendant agreed to pay out of his own pocket. Suppose defendant had agreed to pay, he is not liable, at the suit of his co-partner, until after a final settlement; 2 *Lindley on Partnership*, 915, 919, 920, 994; 1 *Starkie*, 78; 1 *Gray*, 405; 4 *U. C. Q. B.*, 242.

MCDONALD, C. J., (July 14th, 1883,) delivered the judgment of the Court:—

In *Allen v. Gowan*, 4 *U. C., Q. B.*, 242, ROBINSON, C. J., said:—"None of the cases cited respecting the right of one partner to sue another at law upon a mere settlement of accounts, carries the principle further than this, that there must have been either an express promise by the one to the other to pay that particular acknowledged balance, which takes that out of the partnership dealing, or it must have been a final settlement of accounts after the partnership transactions have closed. If, in respect to some particular transaction, one partner has agreed to indemnify another, an action of *assumpsit* will lie, on the ground that the right to be indemnified has, by agreement, been made independent of all other questions between the partners; 3 *Bing.*, 54; 10 *Bing.*, 436; 6 *M. & W.*, 119." In *Coffee v. Brian*, where one partner, in his own name, accepted a bill for a partnership debt, upon a promise by one of the other partners that he would provide funds to pay it, and the acceptor was compelled to pay it, he was held entitled to recover the

amount from the other partner. BEST, C. J., said:—"It has been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all three of the parties, but that has happened which divests them of the property and vests it in plaintiff." PARKE, J., said:—"A partner may sue for a balance due to him upon an account closed and an agreement to pay the amount." In Massachusetts *assumpsit* will lie after a dissolution to recover a final balance due on an implied promise; 15 Mass., 116; though it is supposed in that case that by the English authorities an express promise is necessary. See the note to the American edition of *The Exchequer Reps.*, 5 M. & W., 24. The following note may be found in the same edition to the case of *Jackson v. Stopherd*, 2 C. & M., 366: "Where the business giving rise to a liability between two persons is not the subject of a general continuous partnership, but of particular and separate adventure, and an account is stated and a balance struck, *assumpsit* for the amount due may be maintained; *Wray v. Milestone*, 5 M. & W., 21; and see the note *Id.*, 25. "Where there is a general partnership," said the COURT, in *Brown v. Agnew*, before referred to, "and one partner during its existence pays a partnership debt he is not entitled to recover in *assumpsit* against the other for contribution, but the remedy is by action to compel a settlement of the accounts and adjust the balance due. If, however, the partnership has been dissolved and the accounts adjusted, and one partner is afterwards obliged to pay an outstanding claim not provided for, the action of *assumpsit* would seem to be the proper remedy to recover the proportion which the defendant ought to pay by reason of the joint liability. The transaction would then come within the class which are termed insulated or cut off from the general partnership concern, and would be the payment by a mere joint contractor on the common account." Here, I think, there can be no difficulty whatever. The partnership was dissolved. The defendant undertook to pay all the debts. Both parties were sued. The defendant agreed with the plaintiff that he should pay the debt, and expressly promised to repay him the whole amount. There can be question that this is the proper form of action. The rule *nisi* will be discharged with costs.

RAY *v.* CORBETT.

Before McDONALD, SMITH, and JAMES, J J.

*(Decided July 14th, 1883.)**Libel.—Innuendo.—Functions of Judge and Jury.—Privilege.*

DEFENDANT admitted publication of an alleged libel, and denied that the alleged defamatory matter was published of and concerning the plaintiff with the sense set out in the innuendo.

Held, that it was the duty of the Judge to tell the jury whether the words used were capable of the construction put on them by plaintiff, and to leave it to the jury whether the words were in fact used with such meaning.

Held, further, that under the plea in which defendant justified the publication as a legitimate criticism, the Judge should have told the jury whether or not the occasion created a privilege, and, if so, should have left it to the jury to say whether the defendant was actuated by malice in fact, which, if it existed, destroyed his privilege.

This was a rule to set aside a verdict for defendant in an action for libel, tried before JAMES, J., at Bridgetown, in June, 1882. The libellous matter complained of, and the pleadings, appear fully in the judgment of the Court, p. 410.

Henry, Q. C., in support of rule.—The defendant represents the deduction of $2\frac{1}{2}$ per cent as unlawful, unjust and dishonest, and asks if the people shall send Ray to Ottawa, who has swindled the claimants out of the sum of \$534.50. Under the Act of 1877, chap. 42, the Custos and Treasurer of Annapolis were to borrow a sum of money for railway damages. They could not get the money at the rate in the Act, but had to pay a bonus of $2\frac{1}{2}$ per cent. Ray was of the opinion that the County could not lawfully borrow more than the amount necessary to pay the claims, and that the claimants would have to lose the $2\frac{1}{2}$ per cent. The question is, whether Ray *bona fide* took this view of the situation, rightly or wrongly, or whether he resorted to this expedient as a trick to put money in his own pocket. Mr. Ray assumed the burden of the negotiations with the claimants, and procured their assent to the reduction. Potter is the only one out of all the claimants who pretends to say that Mr. Ray gave any other reason for the reduction, than the rate of interest, and his evidence cannot be relied on for a moment. All agree that Mr. Ray was perfectly open with them, and explained his view of the

law. He did not do so privately, but at a semi-public meeting at Perkins' Hotel. Corbett himself became aware of it, and of the ground on which the per-centage was retained. (McDONALD, C. J.—The only illegal thing was the attempt to make the County pay the bonus, and for that Corbett was as much responsible as Ray. The retention of the per-centage was something that could be assented to. It was only necessary to show this.) If chapter 70, *Revised Statutes*, applied, the claimants could not get interest. They would have therefore lost one year's interest on the whole, and a half year's interest on the half, amounting to 9 per cent., whereas the discount was only $2\frac{1}{2}$ per cent. It was therefore to the interest of the claimants to accept the amount with the discount. A claimant for \$400 would be a gainer to the amount of \$26. If Ray was wrong in his interpretation of the act, all that it amounted to was that he was not as good a lawyer as some others. Corbett himself did not act under the acts of 1877, and it must be assumed that all, by common consent, acted under chapter 70. The defendant is bound to make out that Ray made use of chapter 70 for the purpose of swindling the claimants. The evidence is distinct that Mr. Ray told every one of the claimants, and others, of his reason for making the discount, and not one of them contended that the circumstances did not exist under which the act would apply. The lawyers' bills were subjected to the same discount. The reason given for transferring the money to Mr. Ray's private account is a perfectly satisfactory one. It was to obviate the necessity of claimants going all the way to Bridgetown to get their money, and, in consequence of Mr. Piper's illness. It was purely a matter of convenience. Besides, Corbett admits that Ray asked him to see to the paying out of the money, as he was going to Ottawa. The libel charges that Ray deducted the money dishonestly. The only justification that can be set up is that, having deducted it honestly, he retained it improperly. In reference to the charge of 25 cents by Parker, the Clerk of the Peace, it appears only to have been paid by twelve of the claimants, some of whom admitted that they had been saved a journey of thirty-five miles. It was not part of the business of Parker to go over the County looking up the claimants to save them a journey

to Bridgetown. It saved them ten times the amount. Those who objected to the charge did not pay it. As to extent to which justification must go, see *Folkard on Slander and Libel*, 336, 531, and cases cited.

Sedgewick, Q. C., contra.—It appears that Ray was very much annoyed at the reduction in the damages awarded for his land. (SMITH, J.—You want us to infer that he wanted to make it up.) With other things, it has a tendency in that direction, though it is slight of itself. Potter swears that Ray told him that, as Custos, he was entitled to 2½ per cent. for paying the money, on the ground that Jared Troop had previously obtained that from the Western Counties Railway. He swears this was in the Summer of 1877. The jury have found that the intention existed in Ray's own mind long before he borrowed the money, to appropriate a portion to his own use. The fact that he received an amount from the Sessions that they had no right to grant, shows his unlawful intention. Plaintiff stated that the money was in the Savings' Bank, which is proved to have been false. Ray's talk about the law is additional evidence of his purpose. He knew the law well enough. He knew that the Act of 1877 provided for the payment of the claims in full, with interest, yet he quoted repealed law out of the *Revised Statutes*. The jury disbelieved his explanation.

Graham, Q. C., in reply.—The facts being proved, the deductions are purely a matter for the jury. If the jury came to the conclusion they did from the facts, defendant was justified in coming to the same conclusion from the same facts. All that we need to prove is that a sufficient amount was borrowed to pay the claimants in full, and that the per-centage was deducted and the balance remained at Ray's own private account; 7 *E. & B.*, 639; 8 *A. & E.*, 753; 6 *B. & S.*, 349; *L. R.*, 4 *Q. B.*, 93; *Odgers on Slander and Libel*, 169. The comment was a fair deduction from the facts, plaintiff being a public man; 2 *F. & F.*, 508; 2 *F. & F.*, 71; 4 *F. & F.*, 1005. The statement in the libel was provoked; *Odgers*, 208; *L. R.*, 4 *P. C.*, 495. The Court cannot disturb the inferences the jury have drawn from the facts.

MCDONALD, J., (July 14th, 1883,) delivered the judgment of the Court :—

The printed hand-bill, for the publication of which this action is brought, reads as follows :—

GRAND EXPOSURE

Of what Hallet Ray refused to explain on the Hustings !

WHAT RAY AND THE MORE RABID OF HIS PARTY DID NOT WANT TO HEAR FROM A. W. CORBETT.

Statement of the Loan and Disbursement concerning the Western Counties Railway damages.

COUNTY DEBENTURES ISSUED FOR \$24,000, FOR WHICH W. H. RAY, ESQ., RECEIVED IN CASH \$23,400.

Cr.

By amount paid out by W. H. Ray :

Paid to claimants....	\$21,381 00	
Less 2½ per cent. <i>un-</i> <i>justly taken off.</i> ..	534 50	
	<hr/>	\$20,846 50
Paid first appraisers.....	668 30	
Paid second appraisers.....	133 00	
Paid Lawyer's fees.....	1,200 00	
	<hr/>	\$22,847 80
Amt. in W. H. Ray's hands un- accounted for.		\$552 20
Amt. due claimants.....	\$534 50	
Amt. due county	17 70	
	<hr/>	\$552 20

The above statement, taken in connection with Chap. 42 of the Local Acts of 1877, Section 2, which reads as follows :

The Custos of the County and County Treasurer of such County shall be at liberty to borrow on the credit of this Act and of the County of Annapolis, the whole amount assessed and to pay the same to the several persons entitled thereto,

Shows conclusively that the 2½ per cent. deducted by Ray from the several sums awarded to the claimants, is unlawful, unjust and dishonest. And as the entire sum comprising the above loan was drawn according to law, by the Custos of the County, (Ray,) and the County Treasurer, but placed to Ray's

private account!! And the claimants were paid by Ray's private check; also shows conclusively that the above sum of \$534.50, together with the sum of \$17.70, is still in Ray's private purse or under his private control. The sum of \$534.50 belongs to the claimants of Clements. It is their hard earned money, and the laws of Nova Scotia give it to them, and so H. Ray had no authority, no law, no right to take it from them; neither had Ray's "Private Secretary," so called, otherwise the Clerk of the Peace, any right to the 25 cents exacted for writing each little check given to the claimants, but Ray sat there and saw the electors of Clements robbed.

Now, will the intelligent electors of Annapolis deposit their votes for such a man as Ray has shown himself to be?

The question to be decided at the polls on the 17th is, shall an honest man be sent to represent us at Ottawa, or shall we send Ray, who has swindled the claimants for damages on the Western Counties Railway out of the sum of \$534.50?

A. W. CORBITT.

For publishing this hand-bill the plaintiff brought this action to recover damages; and the writ of summons contains three counts, the first concluding with an innuendo in these words: "The defendant meaning thereby that the plaintiff was a swindler, and had defrauded and obtained money from said claimants under false pretenses for his own use and benefit."

The second count commences thus: "And the said plaintiff further says that the said defendant falsely and maliciously printed and published of the plaintiff, the said plaintiff then being the Custos Rotulorum in and for the said County of Annapolis, and also then and there being a candidate for election in the Electoral District of Annapolis, as a member to serve in the House of Commons of Canada, by hand-bills, and also in a newspaper called the *Morning Herald*, as follows, that is to say," and after setting out the alleged libel, concludes as follows:—"Meaning thereby that the said plaintiff was a swindler, and had defrauded and obtained money from the said claimants under false pretenses, and had converted the same to his own use and benefit, whereby and in consequence of said printing and publishing as aforesaid.

electors of said Electoral District of Annapolis were induced not to vote for the election of said plaintiff, as member to serve in the said House of Commons of Canada."

The third is the same as the first, excepting that the handbill, as set out, does not purport to have been signed by the defendant.

The fourth alleges that the plaintiff, was, at the time, a Custos and candidate, as in the second count mentioned, and concludes as follows:—"Meaning thereby that the said plaintiff was a swindler and was dishonest, and that the said William H. Ray, then and there being Custos as aforesaid, had unlawfully, unjustly and dishonestly deducted and kept back money from said claimants to which said claimants were entitled, whereby and in consequence of said printing and publishing, as aforesaid, electors of said Electoral District of Annapolis were induced not to vote for the election of said plaintiff as a member to serve in said House of Commons of Canada."

And the fifth is the same as the first, except that the innuendo reads thus:—"Meaning thereby that the said William H. Ray as and being such Custos, was unjust and dishonest, and had unlawfully, unjustly and dishonestly deducted from the claimants for damages on the Western Counties Railway the sum of five hundred and thirty-four dollars and fifty cents; and that said William H. Ray, as and being such Custos as aforesaid, had allowed and permitted said claimants to be robbed, and also meaning that the said William H. Ray was a swindler and had defrauded said claimants."

To these several counts the defendant, suggesting that they are for the same cause of action, pleads:

1st. A denial.

2nd. That he did not falsely and maliciously print and publish the words as alleged.

3rd. That he did not do so with the sense or meaning in the declaration specified.

4th. That the defamatory matter is true in substance and in fact.

5th. And for a fifth plea to said declaration, first suggesting as aforesaid, the defendant says that before the committing of the grievance hereinafter mentioned, damages for the

right of way of the railway known as the Western Counties Railway were appraised for the proprietors of the land through which said railway was laid out through the County of Annapolis, under and by virtue of the statutes in that behalf then in force, and thereupon and for the purpose of paying said damages in full and without delay, said chapter forty-two of the Acts of 1877 was passed by the Local Legislature; that before, and at, and subsequent to, the passing of said Act, and ever since, the plaintiff was and has been Custos of said County, and under the provisions of said act he the said Custos and the County Treasurer of said County, borrowed the sum of twenty-four thousand dollars from the "Union Bank of Halifax," and out of said sum paid to said Bank the sum of six hundred dollars as a bonus, leaving twenty-three thousand four hundred dollars, which came to the hands of said Custos and County Treasurer under the provisions of said Act, and which was sufficient to pay in full and without deductions, the total amount of said railway damages to said proprietors; that after the said money was borrowed as aforesaid, the plaintiff prevailed upon the said County Treasurer to join with him in drawing the said sum from said Bank, which was accordingly thereupon drawn out of said Bank upon the joint cheques of said Custos and County Treasurer, and received by the plaintiff and deposited in said Bank in his own name, and to the credit of his own private account; that the plaintiff thereupon proceeded to pay said proprietors the amount of their said damages by delivering to each of them his own private cheque for the amount of said damages, less the sum of two and a half per cent., which he improperly, illegally and fraudulently retained out of the several sums due to each of said claimants, and appropriated the same to his own use, and defrauded the said proprietors thereof; and a further sum of twenty-five cents was illegally and improperly and fraudulently collected from each of said claimants by the Clerk of the Peace of said County, for the certificate of said Clerk of the Peace of the amount due them, and with the knowledge, connivance, and approval of said plaintiff, and the said alleged defamatory matter in said declaration set forth is true in substance and in fact.

The sixth and last plea is the same as the fifth, down to the words "connivance and approval of said plaintiff," and ends thus:—"And thereafter the plaintiff became and was a candidate at an election held in said County to elect a representative for said County for the House of Commons for the Dominion of Canada, and the defendant was an elector of said County, and believing the said plaintiff, from his facts and circumstances, not to be a fit and proper person to represent said County, he caused such alleged defamatory matter to be published; that the said facts and circumstances hereinbefore alleged were matter of public interest and notoriety, and the said alleged defamatory matter published by defendant was a fair and *bona fide* comment on the conduct of the plaintiff in his public capacity, and substantially and in everything material of and concerning the plaintiff a strictly true account, narrative and report of the said transactions, together with a fair and *bona fide* commentary thereon; and the subject matter of the said supposed libel, so far as the same alludes to or concerns the plaintiff, as being such an account, narrative and report of the said transactions, together with the said commentary thereon, were and are matters which it was lawful, fit and proper and useful for the public and for the electors of said County of Annapolis for him, the defendant, to publish and cause and procure to be published, as and being such an account, narrative and report of the said several transactions hereinbefore referred to and such commentary thereon."

The evidence of publication by the defendant is so strong that, if the jury had found that issue in his favor and based their verdict on that finding alone, it would necessarily be set aside, even if the learned Judge, who tried the cause, had not reported, as he did, that he "told the jury they need not consider the question of publication, as that had been explicitly admitted by the defendant's counsel in his address." And, as the law implies malice in cases of defamatory publication, the defendant is necessarily forced to rely upon his pleas of justification, and upon his third plea for his defense. We have seen that the third denies that the defendant published the defamatory matter with the sense or meaning in the declaration alleged, and *that* plea directly raises an issue on the

innuendo in the fifth count, (as well as the others,)—as to the meaning assigned to that part of the hand bill which says, “Neither had Ray’s ‘Private Secretary’ so called, otherwise the Clerk of the Peace, any right to the 25 cents exacted for writing each little cheque given to the claimants. But Ray sat there and saw the electors of Clements robbed.” It therefore became necessary, in my opinion, to direct the special attention of the jury to that issue, telling them whether or not the words were capable of the construction put upon them by the innuendo; and, if they were, it would then be necessary to ask them to say whether or not the words bore that sense upon the occasion in question; *Blugg & Sturt*, 10 Q. B., 899, 906; *Broom v. Godson*, 1 C. B., 728; *Hemmings v. Gasson*, E. B. & E., 346. The fourth plea affirms the truth of the so called defamatory matter, and is included in the fifth, which recites facts in connection with the loan, and justifies the whole defamatory matter as true,—concluding in these words, “And a further sum of twenty-five cents was illegally and improperly and fraudulently collected from each of said claimants by the Clerk of the Peace of said County for the certificates of the said Clerk of the Peace, of the amount due them, and with the knowledge, connivance, and approval of the plaintiff, and the said alleged defamatory matter in said declaration set forth is true in substance and in fact.” Where the jury found any evidence to show any connection, on the part of the plaintiff, with this fraud, if it can be called fraud, I am utterly at a loss to see; unless, indeed, all the other persons who were present and saw and heard all that took place between the Clerk of the Peace and the claimants can, also, be defamed for their inaction in not interfering in other people’s business. I am also at a loss to find any evidence whatever that the charges made by Mr. Parker were fraudulent or amounted to robbery. It by no means follows that, because one makes charges for services rendered, without a statute specifying how much, if any, that charge should be, he is therefore, open to the imputations of fraud and robbery. Parker went to considerable trouble and inconvenience to attend at the place at which the money was to be paid, for no other reason, that I can gather from the evidence, than that it might be more convenient and save time and

travel to the claimants ; and it cannot be said that the paltry charge that he thought proper to make was enough to pay him for his trouble ; nor was any one of the claimants obliged to pay unless he thought fit to do so ; so that the charges of fraud and robbery against Mr. Parker, and of connivance at, and approval of that so called fraud and robbery, preferred against the plaintiff in the defamatory publication complained of are entirely unsupported by the evidence.

We have seen that the sixth plea justifies the publication of the defamatory matter upon the ground that it was a fair and *bona fide* comment on the conduct of the plaintiff, in his public capacity, and I am of opinion that the defendant had a right, on the occasion referred to, to give a fair and impartial statement, *without malice in fact*, of the transactions in connection with the loan in question, even, although he himself was a party to what appears to be the really illegal part of it, namely, the attempt to evade a statute which was intended to protect the rate-payers of the County against being obliged to pay a higher rate of interest than six per cent for the purpose of satisfying the claims of those over whose lands the railroad was to have passed. "The acts of public men which concern the subject may be lawfully commented upon without malice ; but to impute bad or corrupt motives is a libel in either case ; *Campbell v. Spottiswood*, 3 B. & S., 769 ; *Parmeter v. Copeland*, 6 M. & W., 105. If comment is beyond the limits of fair criticism it becomes a libel ; *Campbell v. Spottiswood*, already cited. A charge may be libellous notwithstanding all the facts on which it is founded are also stated, and they do not support the charge ; *Cox v. Lee*, 4 Ex., 284. It will be conceded that, although a publication is privileged, the privilege will be destroyed by evidence of *malice in fact*, and "when the defendant insists that the publication is privileged, it is for the Judge to say whether the occasion creates such privilege. If the occasion creates such privilege and there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of malice should be left to the jury." *Roscoe's N. P. Evidence*, 758. See also 5 *El. & Bl.*, 328 ; *Gilpin v. Fowler*, 9 Ex., 615 ; *Spill v. Maule*, L. R., 4 Ex., 232, 237 ; *Stacey v. Griffith*, L. R., 2 P. C. 420. The defendant's

grounds of justification are set out in his pleas, and assuming that the evidence adduced by him had proved the acts of the plaintiff as facts, so far as the facts are justified by the pleas, it by no means follows that the charges of dishonesty, fraud, swindling, conniving at, and approval of fraud and robbery, and appropriating to his own use the money which he held as trustee for others are also proved. That the three Commissioners, including the defendant, did what the statute gave them no authority to do, is clear,—drawing upon the credit of the county more money than the law allowed, paying more for the loan than the statute authorized, and attempting to hold the county liable for the same. But if, for this reason, the plaintiff was dishonest the defendant and Tupper were equally so. Does it follow that they are dishonest because, acting for others, they mistook their power and the law which defined it? I think not necessarily, by any means. Having had that money illegally in their hands, either the county, the claimants, or themselves would lose the amount illegally attempted to be charged to the county, if the bank was in a position to enforce payment and it would not be very honest to dispute the claims of the bank, even though a mistake in law may have been made. What then, under the circumstances, was the most honest course to pursue? The county was not legally liable for the extra amount drawn; the Commissioners could hardly be expected to pay it out of their own pockets, and the claimants, who were entitled to the full amount of the award when the money could be lawfully obtained were under no obligation to accept anything less than their full claims unless they assented to a discount. The money was irregularly drawn for their benefit, and, if they received the full amount, they would have received, in part, money which was illegally in the hands of the Commissioners. Perhaps the more proper course, under the circumstances, would have been to return the whole amount to the bank,—the claimants waiting for their claims, as they were entitled to interest, and seeking further legislation; but this view does not appear to have occurred to either of the parties. And if the full amount had been paid to the claimants by the commissioners, and received with a full knowledge of the illegality of the manner in which the money was obtained, and of the

non-liability of the rate-payers for the extra amount, (if not for the whole sum,) it would seem that there would be, then, more foundation for charging both the commissioners and the claimants with improper motives in the transaction than there is now for the sweeping charges made against the plaintiff of fraud and dishonesty for settling with the claimants, deducting the discount which, without their consent, he was powerless to deduct. Notwithstanding the first mistake, to which all the commissioners were parties, the plaintiff seems to have done what, under all the circumstances, appeared to him the best. His having drawn the money and placing it to his own account in the bank, if done for the reasons given, might have been done by the most honest man in the country ; and these reasons are not only proved to have existed, but their existence is very probable.

The trial of this cause occupied a very long time, and so did the argument, at which numerous cases were cited, many of them having but little bearing upon the issues upon which the case must turn. Whatever the jury might have found if their attention had been directed to the real questions arising under the fourth and fifth pleas it is quite clear that their attention was not so directed. I am of opinion that the law required the learned Judge to tell them whether or not the words used were capable of the construction put upon them, in every necessary innuendo, and to ask them to say whether or not they bore that meaning in this case on the occasion in question, more particularly *that* in the last count, relating to the plaintiff's complicity in what is insinuated in the defamatory paper to be robbery of the people of Clements by the Clerk of the Peace. Besides this, the third plea directly puts in issue the question as to whether the publication was with the sense or meaning in the declaration specified. I am also of opinion that, under the plea of justification of the publication, as a fair and *bona fide* criticism, it was necessary that the learned Judge should tell the jury whether or not, in his opinion, the occasion created the privilege, and, if it did, that he should then ask them to consider the question whether or not the defendant was actuated by malice in fact, which, if it existed, would destroy that privilege and entitle the plaintiff to a verdict. This was not done, although there is evidence,

both extrinsic and on the face of the defamatory paper, which should have been submitted to the jury with special reference to the question of express malice. Much stress was laid upon that part of the evidence which shows that the plaintiff had not accounted to the Grand Jury and Sessions in April or paid over the balance remaining in his hands until a few days after action, and that fact is relied on as evidence of fraud and dishonesty; but the uncontradicted evidence of the plaintiff explains the reason of the delay, namely, that there were some of the accounts, about \$2,000, unsettled at the time of the April sessions, and that the Grand Jury did not then meet, nor until the October sessions, when the accounts were submitted to them. Equal importance was attached to the evidence that Ray said the money was in the Savings' Bank, contrary to the fact, as testified by several witnesses. He, however, says that what he did state was that the money was as safe in his hands as if it were in the Government Savings' Bank; and, considering the excitement proved to have existed at the time, it is not at all impossible that he might have made use of words which he did not intend to have used, or that he was misunderstood by a considerable number in the audience; but, in either case, the verdict ought to be set aside for the other reasons given, and a new trial granted.

O'KELL v. BELL.

Before McDONALD, C. J., McDONALD, SMITH, and WEATHERBE, J J.

(Decided July 14th, 1883.)

After acquired lands.—*Novus actus interveniens.*—*Equitable title cannot be set up by plaintiff in replevin.*

PLAINTIFF replevied from the Sheriff of Halifax County property seized under execution as the property of one Baldwin, and claimed title thereto under certain bills of sale containing provisions that made the conveyances applicable to after acquired property. The goods were all ordered by Baldwin after the date of the bills of sale, and nothing had been done by plaintiff by way of asserting a right of possession.

Held, that in the absence of any *novus actus interveniens*, plaintiff had not the legal title, and that he could not, in this suit, rely on an equitable title.

This was an action of replevin brought against the Sheriff of the County of Halifax for the detention of goods taken

under an execution, issued by John Stairs, on a judgment recovered against the firm of Baldwin & Co. Plaintiff claimed under bills of sale made to the plaintiff for the benefit of creditors, subject to payment of the debts due, covering after acquired property, and under a transfer, made after the date of the levy, by the Bank of Montreal to plaintiff of a bill of sale, prior in date to that to plaintiff. A verdict was entered for plaintiff by consent, subject to the opinion of the whole Court, on a rule to set the same aside; when the principal question discussed was whether the after required property passed to the plaintiff under the bills of sale.

Sedgewick, Q. C.—O'Kell is not the person to sue, because Gundry's release was made after the cause of action arose. The levy was made 10th November, 1881. The demand was before the 24th November, 1881. The date of the action was 24th November, 1881. Baldwin had an equity of redemption in the goods which the Sheriff had a right to seize. There is no evidence that he intended to sell any more. The goods were ordered by Baldwin subsequent to the date of the bill of sale, O'Kell being absent in England. Baldwin had no power under the bill of sale, to carry on the business. The goods never formed part of the corpus of the business. They never were placed in the business in substitution for others.

Graham, Q. C.—The plea sets up a *jus tertii* in the Bank of Montreal, whereas the bill of sale was to Gundry. (SMITH, J.—*Non constat* that it was not for a private debt.) The goods were in the possession of Baldwin, as the servant of O'Kell. The judgment and execution were against the firm of John Baldwin & Co. The evidence is that the goods were purchased by O'Kell, and that Baldwin was under him. After the execution of the instruments O'Kell was in possession of the goods for two months. The goods were bought in England by O'Kell with trust moneys. (MCDONALD, J.—The evidence is that they were bought with plaintiff's consent. WEATHERBE, J.—They were bought by Baldwin and substituted for others which were sold. There is not a particle of evidence that Baldwin was plaintiff's servant and that the business was carried on by O'Kell through Baldwin.) The deed covers subsequently acquired property; *L. R.*, 5 C. P.

Div., 318; 39 *L. T., N. S.*, 785. The assignment is good if any act is done on the part of the assignee to avail himself of the clause in the deed enabling him to take after acquired property. The fact that Baldwin is proved to have held under O'Kell, brings this case within the principle. This Court, on matters of equitable jurisdiction appearing on argument, may determine them, or may order the case to be transferred to the Equity Judge; *Revised Statutes*, chap. 89, section 6. This Court may completely adjudicate on the matter. (MCDONALD, C. J.—I could understand that if you had pleaded an equitable plea giving notice to the other party. WEATHERBE, J.—The statute refers to equitable matter arising on the argument. That must mean something.) Cites *Freeman v. Harrington*, Oldright, 362. As to conveyances of after acquired property, cites 21 *Grant's Ch., Reps.*, 492; 3 *H. & N.*, 964. The transfer from Gundry to O'Kell transferred all Gundry's interest. Baldwin has put it out of his power to say that O'Kell was not in possession. It is necessary to justify, under the judgment, and no judgment is proved. The record is insufficient. It is not identified in any way. (*Sedgewick, Q. C.*—Under our decisions, which I humbly submit are all wrong, the record need not be signed.)

Sedgewick, Q. C., in reply.—In order to ascertain what is granted, you look not to recitals but to the granting words, The law in reference to subsequently acquired property will be found in *Benjamin on Sales*, 2nd. ed., p. 63, citing 1 *C. B.*, 379. The words in the deed in the case cited were stronger than in the present case. In the House of Lords case, *Holroyd v. Marshall*, 10 *H. L., C.*, 193, it was provided that all the machinery, implements, and things which, during the continuance of the security, should be placed or fixed in or about the mill, in addition to or substitution for those specified in the schedule, should be subject to the trust. The words were specific. It was held that only an equitable interest was created, and that only after property came into the possession of the grantor, which answered to the description. The property subsequently acquired passes where it would be the subject of specific performance in a Court of Equity. That is the test. *Reve v. Whitmore*,

4 DeG., J. & S., 1; *Belding v. Reed*, 3 H. & C., 955. In the latter case the property came on the premises, but the description was held not sufficiently specific. Plaintiff obtained possession by a symbolical delivery of a wine glass. That did not cover subsequently acquired property. The next case is *Lazarus v. Andrade*, L. R., 5 C. P. Div. This also turns on the description, which was clear and specific. The description in the present case would cover all the goods that Baldwin might at any time purchase, wherever situate from date of the deed until the crack of doom. The right is purely equitable; *Colyer v. Isaacs*, 44 L. T., N. S., 870; *Brown v. Fryer*, 45 L. T., N. S., 521; *In re Count D'Epinewil*, L. R. 20, Ch. Div., 758. Plaintiff was not put in any stronger position by the assignment from Gundry. (WEATHERBE, J.—I understand that there was no demand under that assignment. Plaintiff must rely on the assignment from Baldwin.) The goods were conveyed to the Bank of Montreal. A writ of replevin will not lie against a Sheriff. An equitable right cannot be made the subject of a common law action; *Christie v. Thomas*, 3 R. & G., 203.

MCDONALD, J., (July 14th, 1883,) delivered the judgment of the Court:—

The firm of Baldwin & Co. was composed of John Baldwin, William F. DeBlois, and James Fraser, and there was another firm, John Baldwin and Preedy, doing business on Barrington Street, Halifax. This latter firm dissolved partnership in 1881, Preedy transferring to Baldwin his interest in the business, and, as the witness, Bishop, says, "John Baldwin carries on the business now in the name of John Baldwin & Co." On the 20th of December, 1879, John Baldwin and Preedy executed a bill of sale to John Baldwin, DeBlois, and Fraser, and, on the same day, that bill of sale was assigned by Baldwin, DeBlois, and Fraser to Frederick Gundry. It purports to transfer all the stock in trade then being in the shop and premises of John Baldwin and Preedy, on Barrington Street, together with all such goods as in case of sale or disposal of the stock in trade, &c., or any part thereof would be brought by the vendors into the "said shop or premises" in substitution therefor, or any part thereof. On the 1st day

of July, 1881, Preedy and Baldwin dissolved co-partnership by a deed, transferring to Baldwin Preedy's interest in the business, he, Baldwin, assuming the liabilities of the firm, with a right to carry on the business in its name, but on his own account. On the 11th day of the same month John Baldwin executed a deed, transferring to the plaintiff as trustee for the benefit of such of his creditors as would come in under it, all the stock in trade, &c., &c., owned by him in the business in Water Street, conducted by him as John Baldwin & Co., but not to include any property of his in the business conducted by him and Preedy on Barrington Street, under the name of Baldwin & Co. On the 13th day of July, 1881, John Baldwin executed a bill of sale to the plaintiff of all the stock in trade, assets and debts "situate or contained in, upon, or about or connected with said premises or place of business on Barrington Street, or of or belonging to said firm of Baldwin & Co.," &c. This instrument also purports to transfer to the plaintiff "all goods, chattels or effects wherever situate, which the said John Baldwin, in said business and firm, now owns or is interested in, or shall or may from time to time hereafter acquire, purchase, own, or be interested in," * * * "and all goods shipped or to be shipped, or sold to him, but not yet received," &c., * * * "and property now owned by him in said business, or to which he may hereafter become entitled." The consideration was, O'Kell agreeing to act on behalf of the creditors of Baldwin and Preedy, together with one dollar, and the instrument in question was subject to a condition that if the said John Baldwin should pay to plaintiff, acting for the creditors, \$20,000 "in five equal instalments of four thousand dollars, each and every six months from the fifteenth day of July now, (then) next,—the first instalment to be paid on the fifteenth day of January next," the transfer should be void. The bill of sale contains this proviso,—that "nevertheless and in case any default shall be made in the payment of any of the hereinbefore mentioned instalments or payments of money at the times or in the manner hereinbefore mentioned for the payment of the same, although the time named for the payment of the subsequent instalments may not have arrived," the vendee might seize the goods assigned, "including all after acquired property or any part

thereof held, purchased or owned by the said John Baldwin, subsequent to the date hereof in his said business not hereinbefore mentioned. On the 9th day of June, 1881, a writ of summons was issued, at the suit of Stairs, against Baldwin, DeBlois, and Fraser, to which Baldwin pleaded several pleas, afterwards set aside as false, frivolous and vexatious, and the other defendants did not appear. A docket of judgment was signed in the same cause on the 8th day of October, and a writ of execution issued on the same day. It was levied the same day on the goods in question, which were replevied on the 30th November. These goods were not, nor was any part of them, the goods of Baldwin when he executed the assignment and the bill of sale, but were ordered by him afterwards, and, as he says, paid for "after they were seized out of the moneys which came out of the business of Baldwin & Co." They were ordered in the name of Baldwin & Co., and were in the original packages at the time of the levy. None of them had been in Baldwin's store; three of them had only been in the passage-way. They were forwarded to Clements & Co., who endorsed the bill of lading to Baldwin, and the object of sending the bills of lading to Clements & Co. was that Baldwin should not get them until they were paid for. The witness says, "O'Kell took possession of the property in the shop the day the assignment was executed." He adds, "I was then acting as manager for O'Kell until we came to terms, under his instructions. I remained in the place as manager for three months, when we completed other arrangements with him. Have been there ever since. The arrangement under which I continued ever since was made in September. Mr. O'Kell allowed me to buy first on the 1st of July. That was before the assignment. The goods were brought in front of the store on Barrington Street." Again he says, "The very goods were ordered with consent of plaintiff that were taken by the Sheriff." * * * "He gave me permission to buy and sell goods in the store. The profits of the business go into the estate until all the bills are paid, and I only get my board." He does not let us know what were the arrangements made on the first of September, and, although I have referred to his evidence at some length, I do not think that much of it touches the real questions that we have to decide.

It is admitted that at the time of the execution of the bill of sale the goods in question were not those of Baldwin, nor were they, then, under his control, or even ordered; and, for anything that appears, they may not have been then manufactured. They were subsequently ordered by him in his own name, and I do not think it matters much who consented to his doing so, or who did not. And, although it was said at the argument that they were the goods of O'Kell, independently of the bill of sale and assignment, the evidence proves conclusively the reverse. The question to be decided is, whether or not the written papers under which the plaintiff claims, transfer to him the subsequently acquired property, as well as that of which the vendor was owner and in possession at the time of their being executed. The authorities upon the question are numerous, but consistent for many years; and whenever there appears to be a conflict of cases it arises, not from any doubt of what the law is, but from the various circumstances which distinguish one case from the other. In *Benjamin's Work on Sales*, 3rd Am. ed., p. 82. sec. 78, it is said that "in relation to things not yet existing or not yet belonging to the vendor, the law considers them as divided into two classes,—one of which may be sold, while the other can only be the subject of *an agreement to sell* or of an executory contract. Things not yet existing which may be sold, are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, and the sale is valid. But he can only make a *valid agreement to sell*, not an actual sale, where the subject of the sale is something to be afterwards acquired, as the wool of any sheep or the milk of any cows that he may buy within the year, &c., or any goods to which he may obtain title within the next six months." The writer adds, "This distinction involves very important consequences, as will be pointed out hereafter. (Book II.) For the present it suffices to say that, in an actual sale, the property passes and the risk of loss is in the purchaser, while in the agreement to sell or executory contract, the risk remains in

the vendor." He cites numerous cases, and, in a note at the foot of the page, we find it said that "the same principle is adopted in the American decisions upon the subject." He proceeds to say, "but, while the actual sale is valid, the agreement will take effect if the vendor, by some act done after his acquisition of the goods, shows his intention of giving effect to the original agreement or if the vendee obtains possession, under authority to seize them." After citing numerous cases he says; "This modification of the rule is recognized in the cases just cited, and rests, originally, on the authority of the 14th rule in *Bacon's Maxims*." * * *

"See *Brown v. Bateman*, L. R., 2 C. P., 272, where the bargain was in relation to such materials as might be subsequently brought upon the premises under a building contract." He then refers to the rule in Equity, where the beneficial interest is transferred to the vendee as soon as the chattels are acquired. In section 83 it is said that, "In America it has been decided that if a vendor sell a thing not belonging to him, and subsequently acquire a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests, immediately, in the purchaser." This, I think, is good law, and to avoid any misapprehension, we find in a foot note on the same page; "It is not to be inferred from what is stated in the text, that the American doctrine is different from the English, for the prevailing American doctrine is essentially the same as the English, as the cases cited *ante* secs. 78 and 81 show." In *Heilbut v. Hickman*, L. R., 7 C. P., 449, BOVILL, C. J., says: "In the case of executory contracts, where the goods are not ascertained, or may not exist at the time of the contract, from the nature of the transaction, no property in the goods can pass to the purchaser, by virtue of the contract itself; but, where goods are appropriated by the seller and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon the sale of goods which are ascertained at the time of the bargain." *Holroyd v. Marshall*, 10 H. L. cases, establishes this view of the law. In that case, the substituted machinery was not only acquired by the vendor, but was placed by him in the very position and use stipulated between the parties

as mentioned in the bill of sale, and was seized by the vendee, under a power to take it, on default of payment. There could not, in that case, be any question of identity, and the new act necessary to give effect to the agreement was done by the vendor, namely, placing it in the mill in substitution for the machinery which he took out of it, and which was, in law, the property of the vendee. Further, it was proved that default had been made in paying the money intended to be secured, upon which default the vendee was authorized to seize it, and he did seize it under the power given by the bill of sale. Under these facts it was held that the substituted machinery became, as soon as it was put in the mill, subject to the deed, and the vendee was equitable owner and had priority over the execution creditor, without the formality of taking actual possession. Again, in *Belding v. Reed*, 3 H. & C., 955, in which the bill of sale purported to convey all the personal estate and effects of the debtor, then being or thereafter to be upon certain premises, or elsewhere in Great Britain, with power, in case of default in payment of the amount secured on demand, to enter any premises in the occupation of the debtor and distrain the goods. In the absence of the debtor the creditor demanded the debt of the debtor's wife at his house. Thereupon, the creditor seized property acquired by the debtor after the bill of sale, some on his premises and some not. It was held that the after acquired property was not conveyed either in law or equity, as it was not specifically ascertained within the principle of *Holroyd v. Marshall*; and further, that the power to distrain had no operation, as it was conditional upon a demand of payment, which was not legally made. In *Lunn v. Thornton*, (which, as Mr. Benjamin says, is the leading modern case,) 1 C. B., 379, it was decided that a grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is invalid, unless the grantor ratify the grant by some act done by him, with that view, after he has acquired the property therein. In that case, although the vendor subsequently acquired the goods in controversy, and had them, without doubt, in his possession, the vendee was held liable in an action of trover for taking and converting them to his own use, for the reasons given in the

judgment. TINDAL, C. J., said : " It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him and brought on the premises, in satisfaction of the debt ; but, the question before us arises upon a plea which puts in issue the property in the goods and nothing else ; and it amounts to this whether by law, a deed of bargain and sale of goods can pass the property in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." He then refers to Lord BACON's maxim, rule 14th, and says, " Upon which it is to be observed that Lord BACON takes the first branch of the maxim, that a disposition of after acquired property is altogether inoperative, as a proposition of law that is to be considered as beyond dispute, and only labors to establish the second part of the maxim, namely, that such disposition may be considered as a declaration precedent which derives its effect from some new act of the party after the property is acquired ; for he says, ' the law doth not allow of grants of title or of things in action which are imperfect interests ; much less will it allow a man to grant or encumber that which is no interest at all but merely future.' " The learned Chief Justice then refers to the contention of the defendant that the bringing of the goods upon the premises of the plaintiff, where they were seized, was the new act done which gave effect to the bill of sale, and adds : " But to this it appears to us to be an answer, that the evidence at the trial is altogether silent upon the circumstances which accompanied the bringing of the goods upon the premises so that it is impossible to say whether it was the act of the plaintiff or not. And further the new act to which Lord BACON refers appears, in all the instances which he puts, to be an act done by the grantor for the avowed object and with a view of carrying the former grant or disposition into effect. Lord BACON's language is, " there must be some new act or conveyance to give life and vigor to the declaration precedent," which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative ; but points at some new act to be done by the grantor in

furtherance of the original disposition." It is not necessary to cite more authorities in order to support this view of the law, and, as it cannot be contended that the goods in question were the "natural product or expected increase" of anything belonging to the vendor—in other words, that they had any "potential existence," at the time of the execution of the documents under which the plaintiff claims, it is safe to say that he cannot recover in this action without showing either the vendor's intention of giving effect to the original agreement, by some new act done, "*after* his acquisition of the goods," or that the vendee obtained possession of them under authority to seize, thus bringing the case, if possible, within the modification of the rule of law which, without such modification, would make the attempted transfer void. To do so, on the ground that the vendor did some new act to further the original intention, it will be found necessary, as shown in all the cases, that such new act must be proved to have been done, not before or during the acquisition of the goods, but *afterwards*. The mere act of acquiring the goods is not sufficient; otherwise, as TINDAL, C. J., says, the rule itself would be altogether inoperative. The evidence clearly shows that there was no such new act on the part of the vendor in this case, *after he acquired* the property, as could in law, make the transfer operative; so that, under the law, as administered in *Lunn v. Thornton*, if the plaintiff had taken the goods in question without the authority of Baldwin he would be liable to the latter in trover. The only remaining way by which the plaintiff could bring the case within the exception to the rule which renders the sale absolutely void, would be by proving that he obtained possession of the property under authority, in the bill of sale, to seize it; and it cannot be contended that he ever had possession of it as against Baldwin or otherwise. Even if he had seized it, his doing so would have been wrongful, inasmuch as the authority to seize, contained in the bill of sale, is conditional upon Baldwin's default in paying any of the instalments at the time fixed therefor. It is not only not proved that such default was made, but it is clear that no default could be made, inasmuch as the first instalment was not due, nor would it become due until the month of January following the levy. It was held, in *Belding v. Read*, 3 H. & C.,

955, as we have seen, that a seizure of goods under a power to seize, in case the amount secured was not paid *on demand*, was illegal and without effect, because the demand was only made of the debtor's wife, in her husband's absence from home.

The learned counsel who argued this cause for the plaintiff, assuming, as I suppose, that his client had equitable rights, referred us to chapter 89, *Revised Statutes*, section 6, which shows the equitable powers of this Court; but, under the pleadings, the equitable rights of the parties do not come in question, and whatever power of amendment the Court may possess, this does not appear to me to be a case which demands the exercise of that power. I do not, by any means, desire to intimate an opinion that we have the power, by any amendment of the pleading, to enable the plaintiff to succeed, on equitable grounds in an action like this, brought on the common law side.

It is not necessary to decide what the effect may be of the prior bill of sale from Baldwin and Preedy to Baldwin, DeBlois and Fraser, which was assigned by the latter to Gundry before any transfer of the property was attempted to be made by Baldwin to the plaintiff. That document, like the other, purported to transfer subsequently acquired property and, even if the acquisition of it by Baldwin could have been construed to be a new act of his, indicating an intention to give effect to any one of the bills of sale, there is nothing in the evidence to show that he intended to give effect to the last in preference to the first; but, in the absence of any such evidence, it is, I think, safe to say that the first would take effect, if at all, before the last. Then, if Gundry had a right of action against the Sheriff on the goods being levied upon, O'Kell had no such right, and it is questionable how far the paper which he afterwards signed, purporting to be a release or transfer of his rights in his property to the plaintiff would, in law, be sufficient to effect the intended purpose. This view of the case was not, however, discussed at the argument, and I am, therefore, glad that it is not necessary to rest the decision of the case upon it.

I am of opinion that the rule *nisi* to set aside the verdict must be made absolute with costs.

WEATHERBE, J., concurred in the conclusion arrived at.

MARSHALL v. ANDERSON.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J. J.

(Decided July 14th, 1883.)

Replevin.—Goods not in possession of defendant, but of his assignees.

DEFENDANT, having dissolved his connection with the firm of C. & W. Anderson, ordered the goods in question from plaintiff. The agent forwarded the order in the name of C. W. Anderson instead of W. C. Anderson, (the defendant's name,) and plaintiffs sent the goods addressed to C. & W. Anderson, who refused to receive them. They afterwards came into possession of defendant, and at the time of the seizure were in the store of defendant, where the business was being conducted by assignees, under a bill of sale, conveying all defendant's property. When the demand was made, defendant was merely a salesman for the assignees, and told the plaintiff's agent that he could not give up the goods as they were not his.

Held, that the plaintiff could not succeed in replevin, as the goods were not, at the time of the seizure, in the possession of the defendant, or at least that there was not sufficient evidence to the contrary to enable the Court to set aside the verdict found by the Judge without jury, for the defendant.

WEATHERBE, J., dissenting.

This was a rule taken under the statute to set aside a verdict for defendant in an action of replevin, brought by plaintiff to recover possession of certain goods ordered by defendant through plaintiff's agent. The defendant, W. C. Anderson, had previously been a member of the firm of C. & W. Anderson, with whom the plaintiff had had dealings. The order was forwarded to plaintiff in the name of C. W. Anderson, and the goods were forwarded, addressed to C. & W. Anderson. On their arrival, C. & W. Anderson wrote the plaintiff, refusing the goods, which subsequently came into possession of defendant and remained in his possession until after his insolvency.

Harrington, Q. C., in support of rule.—Cites 2 *H. & C.*, 906. (McDONALD, C. J.—There can be no doubt that if the plaintiff intended to send the goods to C. & W. Anderson and not to W. C. Anderson, there is no sale; but I fail to see the evidence. There is no evidence that he tried to correct the mistake.) There is no evidence that the plaintiff had notice that W. C. Anderson had possession of the goods, until he tried to recover them. The only delay, if there was any, on the part of the plaintiff, was previous to the date of the assignment. (WEATHERBE, J.—The delay can make no difference unless plaintiff knew defendant had the goods. If he had no

such knowledge for six years, he could bring his action. SMITH, J.—My impression, right or wrong, was that the goods having been ordered by the defendant, and having been sent in fulfilment of that order, the mistake which was made in the name made no difference.) *El., Bl. & El.*, 1004.

Lynch, Q. C.—There is no doubt that the plaintiff's agent took the defendant's order, knowing distinctly with whom he was dealing. In transmitting the order the agent made a mistake in the defendants initials. Our contention is that they knew with whom they were dealing. If there was any mistake it was the plaintiff's. When the plaintiff knew that C. & W. Anderson refused the goods, as a prudent man, he should have taken steps to repossess himself of the goods, but he did not do so until after W. C. Anderson's insolvency, and only then because it suited his convenience. The plaintiff must have known previously where the goods were. The delay of the plaintiff after knowing of the repudiation of the goods by C. & W. Anderson, was a full recognition of the contract with defendants. The possession of the goods was not in Anderson, but had passed to his assignees, for whom he was merely acting as clerk. The fact of the defendants having parted with possession of the goods was notorious. Plaintiff applied to one of the assignees to deliver up possession of the goods.

Graham, Q. C., (with Sedgewick, Q. C.)—We all agree that there has been a mistake, and that it was not made by the defendant. The question is whether the plaintiff, having made the mistake, can set it up as against the defendant. The agent knew all the time that defendant was doing business for himself. Plaintiff received an order for goods for C. W. Anderson, and "presumed" they were for C. & W. Anderson. (RIGBY, J.—The question in my mind is whether plaintiff ratified the sale to defendant on discovering the mistake.) Plaintiff had a person, (this agent,) in his employ during two months, who knew who got the goods. The plaintiff had the opportunity of making himself acquainted with the facts. If plaintiff has made a mistake the burden is on him to account for the delay in correcting it. (RIGBY, J.—The burden is on you to prove the ratification.) The

repudiation by C. & W. Anderson, and the fact that the agent who sold the goods was in plaintiff's employ, gave the plaintiff sufficient means of knowledge.

RIGBY, J., (July 14th, 1883,) delivered judgment as follows :—

This was an action of replevin, tried before my brother SMITH, without a jury, whose judgment was for defendant, to set aside which a rule *nisi* was taken out by plaintiff and argued before us. The firm of C. & W. Anderson, of Halifax, of which defendant had been a member, had been a customer of plaintiff, who did business at Montreal under the name of "J. Rattray & Co." After defendant had withdrawn from the former firm and commenced business on his own account, the old business being still continued under the old name, William Ross, plaintiff's travelling agent, took an order at Halifax from defendant for certain goods, which order he made out and forwarded to his principals, as for C. W. Anderson instead of W. C. Anderson, and plaintiff's firm having caused the goods specified in such order to be invoiced and shipped to C. & W. Anderson, they reached Halifax so addressed, but, being refused by the firm then carrying on business under that name, were, without plaintiff's consent, taken possession of by the defendant, with whom plaintiff had never done business. Admitting, upon the facts in proof, that the contention of plaintiff's counsel is sound, that there was not sufficient mutuality between plaintiff and defendant to complete a contract of sale to the latter of the goods in question, and that the right of property was still in plaintiff, and that he was entitled to the possession, yet it was urged by counsel for defendant that this came within the decision in *Fraser v. Bruce* 3 R. & C., 61, and that the replevin would not lie against the defendant as he had not possession of the goods when it was brought, and it therefore becomes necessary to consider whether there is evidence to support the finding of the learned Judge upon that issue. After defendant obtained possession of the goods he, on the 8th of October, 1881, made an assignment of his property for the general benefit of his creditors, to Joseph Seeton and Cathcart Thomson, both merchants of Halifax. This action was com-

menced November 23rd, 1881, and the day previously the goods in question had been demanded by Ross and plaintiff's attorney from defendant, who said "it was impossible for him to return them," and gave as the reason, "that he had made an assignment of them, and had parted with the possession." Joseph Seeton, one of the assignees, stated in his evidence that the assignees, immediately after the assignment, put an accountant into the store to take charge of it; "he was there probably two months. * * * He had charge of the whole concern. He received the moneys and accounted for them." Defendant, in his examination says, referring to the goods in controversy, "I sold some before assignment, and gave over the rest to my assignees. * * * I have been in the employ of assignees since as clerk, on a salary, and I paid over the proceeds to Mr. Bishop, or accounted for them. There were half a dozen salesmen besides myself. When Ross demanded the goods I was merely a salesman. I told him I could not give up the goods, they were not mine." It was said at the argument that, under the terms of defendant's assignment, the goods referred to would not pass to his assignees, and that therefore we should conclude that the possession was not changed but still remained in defendant. The description of the property assigned includes the whole of defendant's "personal property, stock in trade, goods, wares, merchandise * * * and also all other his personal property of every nature and description, situate and being at Halifax, or wheresoever else found and being, and all his claim, right, and interest therein." The defendant, when the assignment was executed, was claiming the goods in question as his own absolute property, and, no doubt, intended to transfer them as part of the stock in trade in his place of business; and subsequently to the assignment Bishop, the accountant of the assignees, was in actual possession of the shop and stock, including, in my opinion, these goods. But in any event, I do not think there is any such sufficient evidence to the contrary as to justify us in interfering with the finding of the learned Judge, and the rule *nisi* should be discharged with costs.

SMITH, J., concurred.

WEATHERBE, J.—The goods in question, belonging to the plaintiff, were in defendant's possession in his shop, when he became embarrassed in his business and assigned all his personal property to Seeton and Thompson, who put an accountant in his store. Defendant remained in the store where the goods in question were, and continued selling the goods assigned, but at a salary from the assignees. Plaintiff demanded his goods from defendant at the store where they and defendant were. Defendant refused to deliver them, giving as a reason, that they were not his—that they were assigned. It is not denied that the only change of possession which took place was that under and by virtue of the assignment. Practically, I suppose, they remained, and were, when demanded, on the shelves and within reach of defendant. It must, I think, be clear that these goods did not pass by the assignment, and defendant had a right when they were demanded to hand them over to the plaintiff, to whom they belonged. No person could have lawfully interfered with him for so doing. And I am of opinion that this action is well brought against defendant, and the verdict should have been for plaintiff. Suppose the demand had been made on the assignees, who were never in the actual possession of the goods, and they had refused, I think the plaintiff would have failed. And it seems to me impossible to say that plaintiff should be driven to seek his remedy against those who had no actual possession and no right to the possession of the goods.

GREGORY v. THE HALIFAX AND CAPE BRETON
RAILWAY AND COAL COMPANY ET AL.

Before McDONALD, SMITH, and JAMES, J J.

(Decided July 14th, 1883.)

Service on Company out of Province.—Suggestion must be traversed if disputed.—Want of authenticity in corporate seal must be specially pleaded.—Acts relating to Eastern Extension Railway.—Interest added under power in rule to increase verdict.

PLAINTIFF entered on the record a suggestion that the Canada Improvement Company, one of the defendants, was absent out of the Province when the writ of summons was issued, and on that account could not be served with process. The suggestion was not traversed and it was contended by defendants that it had not been proved at the trial, and therefore, that plaintiff should have become non-suit under *Revised Statutes*, chap. 94, secs. 347 and 350, and, further, that the defendant could have been served under section 41 of the Canada Joint Stock Companies Clauses Act of 1869, (Chap. 12 of 1869,) made applicable to this company by Chap. 119 of 1872, sec. 9.

Held, that the suggestion, if the truth of it was denied, should have been traversed by defendants, and that the section of the Canada Joint Stock Companies Clauses Act referred to, did not enable service to be made by any other than the accustomed officer, nor beyond the jurisdiction of the Court.*

Defendants pleaded as to certain agreements alleged to have been made by them under seal, that the alleged deeds were not their deeds, and that they did not undertake and promise as alleged.

Held, that under R. S., c. 94, s. 152, an objection could not under these pleas be taken to the authenticity of the seals affixed to the agreements as the seals of the defendant companies.

Semble, that under the Joint Stock Companies Clauses Act, sec. 31, made applicable, as aforesaid, to the Canada Improvement Company, one of the defendants, and the *Revised Statutes*, chap. 53, sec. 15, which was applicable to the Halifax and Cape Breton Railway and Coal Company, another defendant, the contract sued on would be valid and enforceable without seals.*

Plaintiff set out in his declaration an agreement between one Harry Abbott and the Government of Nova Scotia for the construction and equipment of the so-called Eastern Extension Railway from New Glasgow to the Strait of Canso, a transfer of Abbott's interest in said contract to the Halifax and Cape Breton Railway and Coal Company, a contract between the company last mentioned and the Canada Improvement Company, by which the latter were to construct and equip the road, and a contract between said Canada Improvement Company and the plaintiff, under which the plaintiff was to construct and equip the road, receiving, as the work progressed, payment in cash and bonds of the Halifax and Cape Breton Railway and Coal Company, as in the agreement set forth. The declaration then set out a series of transactions, including a suit by the plaintiff to recover damages for alleged breach of the agreement made by him for the construction of the road, and a final compromise and settlement embodied in the agreement upon which the present action was brought. By this

* The learned Judge who delivered the judgment of the Court, considered that the authenticity of the seals, as well as the truth of the suggestion that the Canada Improvement Company was absent, &c., had been sufficiently proved. It is not perfectly clear whether the judgment of the Court on these branches of the case proceeds on their finding of the facts or upon the pleadings.

agreement the Canada Improvement Company contracted to deliver to plaintiff, so soon as the same could legally be issued, (to which and the two companies,—both being parties to the agreement and defendants in the action,—covenanted to use every diligence,) eighty thousand dollars in good, sufficient and available first mortgage bonds of said Halifax and Cape Breton Railway and Coal Company, which should be a first lien on the Pictou Branch,—to be handed over by the Dominion Government in aid of the construction,—on the Eastern Extension, and also on the said Halifax and Cape Breton Railway and Coal Company, and the property mentioned in the company's act of incorporation. The Halifax and Cape Breton Railway and Coal Company also covenanted for the handing over of said bonds by the Canada Improvement Company at the time and manner and of the character and description stipulated. The agreement contained covenants and conditions on the part of plaintiff as to the performance of which there was no dispute. The breaches alleged were that the defendants failed to deliver the bonds as stipulated, that they did not use due diligence as stipulated, and that they had entered into agreements and sought and procured legislation which rendered it impossible for them to hand over bonds of the character stipulated. Defendants relied on one of the statutes so procured, namely, the Act of the Legislature of Nova Scotia, cap. 66 of 1879.

Held, that the Act afforded no defence to the plaintiff's action for damages for the non-fulfilment of the agreement.

After pleading to the declaration, defendants added pleas as to one half the amount of the mortgage bonds claimed, setting out, in different forms, that plaintiff had assigned the same to the Government of Nova Scotia, and given Hon. P. C. Hill, then Provincial Secretary, authority to receive them, and that the Canada Improvement Company had accepted the order and become bound to deliver said bonds to the Government of Nova Scotia, and that the suit was not brought on behalf of the said Government, or with their consent. Plaintiff replied, denying the fact of the assignment, alleging that there was no consideration, and that the assignment was made subject to a condition that there should be no legislation by the Legislature of Nova Scotia adverse to the interests of the plaintiff, which condition was violated. The Court, having power under the rule to determine the fact, found that the plaintiff's version of the agreement to assign was sustained by the evidence, and gave judgment for the plaintiff, adding,—under the power given in the rule to increase the verdict,—interest from the date of the agreement between defendants and the Government, which resulted in the legislation under which it became impossible to perform the covenant to deliver the bonds.

This was an action brought by plaintiff to recover damages for the breach of a contract entered into with the defendant Companies relating to the construction of a line of railway from New Glasgow to the Strait of Canso. The cause was tried at Halifax, before McDONALD, J., in April, 1882, when it was agreed that a verdict should be entered, by consent, for plaintiff for \$80,000, with power to the Court, on argument, to increase or reduce the amount, direct a non-suit, or order a new trial; also, to draw inferences of fact as a jury, adjudge on facts, and decide on weight of evidence; rules to be taken by both parties if desired. Rules were taken accordingly. The rules were argued March 12th, 1883, by *Meagher, Q. C.*, and *Sedgewick, Q. C.*, for plaintiff, and by *Graham, Q. C.*, and *Ritchie, Q. C.*, for defendants. The facts relied on, pleadings, etc., are set out at length in the judgment of the Court.

MCDONALD, J., (November 6th, 1883,) delivered judgment as follows :—

The leading facts relied upon by the plaintiff in this case are, as he alleges, that on the 31st of October, 1876, Harry Abbot entered into a contract with the Government of Nova Scotia, for certain considerations therein mentioned, to construct, complete, equip and work the traffic of a railway, now known as the Halifax and Cape Breton Railway and Coal Company road, which contract was, on the 20th December, 1876, transferred by Mr. Abbott to the Halifax and Cape Breton Railway and Coal Co. On the same day the Canada Improvement Company agreed with the Halifax and Cape Breton Railway and Coal Co. to build, construct and equip the road. Two days afterwards the Canada Improvement Company and the plaintiff entered into an agreement that the plaintiff, for certain considerations therein mentioned, should locate the road, clear and fence the lands taken for the railway, and take all necessary steps to obtain possession of the right of way therefor, and grade and prepare the road-bed, ready for the laying of the rails, and provide the sleepers and timbers, etc. For the performance of his part of the agreement, the plaintiff gave a bond with two sureties to the Canada Improvement Company, which bond was afterwards assigned to the Government of Nova Scotia, as additional security for the performance by Abbott of his contract with the Government. It is alleged that the plaintiff proceeded with the work until he claimed a large amount to be due to him in bonds of the Halifax and Cape Breton Railway and Coal Company, under his agreement with the Canada Improvement Company, and the latter company, as the plaintiff says, representing that the bonds could not be issued at the time, he suspended work and commenced two actions to recover damages for the alleged breaches, one in the Supreme Court at Kentville against Sir Hugh Allan, and the other at Halifax against the Hon. John Hamilton, they being two of the directors of the Canada Improvement Company whose names were subscribed to the contract. A compromise was afterwards effected—the Canada Improvement Company paying to plaintiff \$10,000 in cash, and giving the promissory notes of Sir Hugh Allan and Andrew Allen, payable in nine and

twelve months, for \$10,000 each, with interest; and, as a further result of that compromise, an agreement was entered into, under seal, on the 31st day of August, 1878, between the Halifax and Cape Breton Railway and Coal Company of the one part, the Canada Improvement Company of the second part, and the plaintiff of the third part, which agreement is fully set out in the first count of the plaintiff's declaration in this case. On this agreement the plaintiff brought this action, his declaration containing six counts, the last of which was abandoned at the trial, each count assigning various breaches; and, as the first count contains the agreement upon which he sues, together with allegations and averments to some of which it was deemed necessary to refer in other counts, I give it in full, although it is necessarily somewhat lengthy:—

“ To the Sheriff of the County of Halifax, or to any other of our Sheriffs :

“ We command you to summon The Halifax and Cape Breton Railway and Coal Company, (Limited,) and the Canada Improvement Company, (Limited,) bodies corporate, to appear in the Supreme Court at Halifax, the said Halifax and Cape Breton Railway and Coal Company, (Limited,) within ten days, and the said Canada Improvement Company within forty days after the service of this writ, at the suit of Charles Currie Gregory, who says that on or about the thirty-first day of August, A. D. 1878, a deed or articles of agreement, under seal, was made and entered into by and between said Halifax and Cape Breton Railway and Coal Company, (Limited,) of the first part, the said Canada Improvement Company, (Limited,) of the second part, and the plaintiff of the third part, which is in the words and figures following, that is to say :

“ARTICLES OF AGREEMENT made, had, and entered into this thirty-first day of August, A. D. 1878, between the Halifax and Cape Breton Railway and Coal Company, (limited,) a body corporate, of the first part; The Canada Improvement Company, (limited,) a body corporate, of the second part, and Charles Currie Gregory, of New Glasgow, in the County of Pictou and Province of Nova Scotia, Civil Engineer, of the third part.

"WHEREAS, by indenture bearing date the 31st day of October, A. D. 1876. and made between Harry Abbott of the town of Brockville, in the Province of Ontario, Civil Engineer, of the one part, and Her Majesty the Queen, represented in that behalf by the Honorable Robert Robertson, Commissioner of Public Works and Mines, on behalf of the Province of Nova Scotia, of the other part; the said Harry Abbott, for certain considerations set forth in said Indenture, did contract and agree to build and construct, complete, equip, and work the traffic of a certain Railway, to begin at a point on the Intercolonial Railway at or near New Glasgow, aforesaid, and thence to extend to a point on the Strait of Canso, and known as the Eastern Extension Railway,

"And whereas, by memorandum of agreement dated the 20th day of December, A. D. 1876, the said Harry Abbott did convey and transfer to the Halifax and Cape Breton Railway and Coal Company, aforesaid, all his right, title, and interest in and to said contract,

"And whereas, by Indenture bearing date the 20th day of December, A. D. 1876, and made by and between the Canada Improvement Company, aforesaid, of the one part, and the Halifax and Cape Breton Railway and Coal Company, aforesaid, of the other part, the said Canada Improvement Company did promise and agree to and with the Halifax and Cape Breton Railway and Coal Company, aforesaid, to make, build, construct, complete, and equip said Eastern Extension Railway for certain considerations, in said Indenture specified and set forth,

"And whereas, by Indenture bearing date the 22nd day of December, A. D. 1876, and made between the Canada Improvement Company, aforesaid, of the first part, and the said Charles Currie Gregory, of the second part, the said Charles Currie Gregory contracted and agreed to locate said Eastern Railway Extension, to clear and fence the lands taken for the road-way, and take all necessary steps to obtain possession of the right of way therefor, and to grade and prepare the roadbed, ready for the laying of the rails, and to provide the sleepers and other timber to be used in laying the track, and to lay the track, and to do other work, and furnish other materials in connection with the construction of said Railway,

as fully set forth in said Indenture, in consideration whereof the Canada Improvement Company aforesaid did agree in and under said Indenture that they would pay said Charles Currie Gregory the sum of \$4,800 in cash, and \$3,750 in first Mortgage Bonds of the Halifax and Cape Breton Railway and Coal Company aforesaid for each and every mile of the said Railway, such payment to be made monthly for the work done, according to the return made or agreed to by the Government Engineer in the proportions indicated in a certain schedule referred to in said Indenture,

“And whereas, as security for the faithful performance by him, the said Charles Currie Gregory, of all things on his part to be done and performed in and under said last recited Indenture, he, the said Charles Currie Gregory, as principal, and John Pickard, Esquire, and John James Fraser, Barrister-at-Law, both of Fredericton, in the Province of New Brunswick, as sureties, entered into a Bond to the Canada Improvement Company, in the penal sum of \$100,000, dated the 30th day of December, A. D. 1876, which Bond was subsequently assigned to the Government of Nova Scotia as additional security for the performance of said contract hereinbefore recited as having been entered into by and between said Harry Abbott and Her Majesty the Queen,

“And whereas the said Charles Currie Gregory duly proceeded with the works contracted by him to be done in and under said Indenture hereinbefore recited, until he claimed a large amount to be due to him in Bonds of said Halifax and Cape Breton Railway and Coal Company, as and for the monthly payments which he was entitled to receive from said Canada Improvement Company, and, the said Canada Improvement Company having represented that said Bonds could not be issued by the Halifax and Cape Breton Railway and Coal Company aforesaid at that time, the said Charles Currie Gregory suspended work upon said railway and commenced two actions to recover damages for the alleged breach of the said contract by the said Canada Improvement Company, one in the Supreme Court at Kentville, against Sir Hugh Allan, Knight, and the other at Halifax against the Honorable John Hamilton, Senator, both of Montreal, in the Province of

Quebec, being two of the Directors of said Canada Improvement Company whose names are subscribed to said Indenture made between said company and said Charles Currie Gregory,

“And whereas the said Charles Currie Gregory was represented to be a stockholder in said Canada Improvement Company but he refused to acknowledge himself to be such stockholder and refused to pay any call thereupon,

“And whereas a compromise and settlement has been made by and between the said Canada Improvement Company and Charles Currie Gregory in pursuance of which the said Canada Improvement Company has this day paid to the said Charles Currie Gregory the sum of ten thousand dollars in cash and delivered to him two joint and several promissory notes of Sir Hugh Allan and Andrew Allan, payable respectively, with interest, at nine and twelve months after date, each for the sum of ten thousand dollars,

“Now this Indenture witnesseth, and the several parties hereto hereby jointly and severally for themselves and each of them, their, and each of their successors, executors, administrators, and assigns, in consideration of the covenants and agreements herein contained, on the part and behalf of the other and others of them to be done and performed, do covenant, promise and agree to and with the others and other of them jointly and severally and their and each of their successors, executors, administrators and assigns, in manner and form following, that is to say :

“The said Canada Improvement Company hereby agrees to deliver to said Charles Currie Gregory as soon as the same can be legally issued, to which end the said companies agree to use every diligence, Eighty Thousand Dollars in good, sufficient, legal and available First Mortgage Bonds of said Halifax and Cape Breton Railway and Coal Company, and which shall, so far as the said parties of the first and second part can make them do so attach and be a first lien upon the Truro and Pictou Branch Railway, which is to be handed over by the Government of the Dominion of Canada to said Halifax and Cape Breton Railway and Coal Company as a subsidy towards the construction of said Eastern Railway Extension, provided always that such branch railway shall be so handed

over, the said Eastern Railway Extension, and also upon said Company and the property, rights and privileges set forth in section 32 of the Act incorporating said Halifax and Cape Breton Railway and Coal Company.

“The said Bonds and the Mortgage or other conveyance or lien by which they may be secured, to be free from all unusual clauses or considerations by which the holders or Trustees may be precluded from selling the property upon which said bonds are to constitute a lien as aforesaid, or foreclosing said mortgage or otherwise realizing said Bonds in case of non-payment of the principal or interest, or from any other unusual defeating clause or condition impairing the remedy of the holder or holders of any bond or coupon in event of default being made in the payment of said principal or interest.

“It is further agreed that the whole issue of such first Mortgage Bonds shall not exceed twelve hundred and fifty thousand dollars, and shall bear interest at the rate of six dollars per centum per annum, and that no other Bonds, Mortgage, Stock, Shares, Lien, charge or other security or securities, shall take precedence of the said Bonds so to be given to said Charles Currie Gregory as aforesaid. It is nevertheless understood that provision may be made in such Bond, or the deeds securing the same, to enable clear titles to be given of the lands of said Railway Company in the event of their being sold for agricultural or other purposes, the proceeds, however, to be paid to the Trustees or otherwise secured for the benefit of the bondholders.

“And the said Halifax and Cape Breton Railway and Coal Company hereby covenants and guarantees that the said Canada Improvement Company will deliver to the said Charles Currie Gregory said Bonds of said Halifax and Cape Breton Railway and Coal Company at the time, in the manner, and of the character, description and value hereinbefore specified, and that they the said Halifax and Cape Breton Railway and Coal Company will, if it should prove necessary to do so, apply for and endeavor to procure at the earliest opportunity such legislation as will remedy any alleged

defects, if any, now existing in their organization and place them in an undoubted position.

“ And it is further understood by and between said parties hereto that the Government of Nova Scotia shall be at liberty and is hereby permitted and required to use all means within its power to enforce the delivery of said Bonds to said Charles Currie Gregory by either of said companies, their successors or assigns, or by any other company or companies which may be substituted for them or either of them, it being intended that said Government may withhold any consent or privilege, or omit or refuse to do any act within its jurisdiction required or necessary to enable said company or companies or substituted company or companies to draw any Government aid or receive any subsidy or subvention, or issue said Bonds or otherwise, until said Government is satisfied that the right of said Charles Currie Gregory to receive said Bonds is protected and assured.

“ And it is hereby further agreed by and between the said parties hereto that the said contract so entered into by and between the said Canada Improvement Company and the said Charles Currie Gregory and the said Bond of the said Charles Currie Gregory and the said John Pickard and John James Fraser shall be, and the same and each of them are hereby finally surrendered, cancelled, and terminated from and after this date ; but the said contract shall, nevertheless, remain in force and be available to and for the said Charles Currie Gregory to the fullest extent, as if this agreement had never been made, provided default shall be made in payment of the said two promissory notes hereinbefore specified and set forth as having been delivered to said Charles Currie Gregory, or if any claim shall be lawfully made against the said Charles Currie Gregory as a stockholder of said Canada Improvement Company, or in consequence of his being named as such upon the books of said company.

“ And it is further agreed that the said Charles Currie Gregory shall be relieved from all liability upon all stock or shares of said Canada Improvement Company standing in his name, and it is hereby understood and declared that said Charles Currie Gregory will not be liable in any way as a

member of said Canada Improvement Company, nor a stockholder or shareholder therein, and will be and hereby is indemnified and saved harmless from all claim or claims against him of any nature or kind whatsoever as such member, stock or shareholder, and from the claims of all creditors of said company or otherwise, and the said Charles Currie Gregory hereby agrees to transfer said shares to said Sir Hugh Allan upon being indemnified by said Sir Hugh Allan, against all claim against him, the said Charles Currie Gregory, as such alleged shareholder, but this, however, not to be considered any acknowledgment of said Charles Currie Gregory, that he ever was a member, stock or shareholder of said Company.

“And the said Canada Improvement Company doth hereby remise, release, and forever discharge the said Charles Currie Gregory, his heirs, executors, administrators, and assigns, of and from the said contract or agreement so made by and between them as aforesaid, and of and from said Bond made by said Charles Currie Gregory, John Pickard, and John James Fraser, and of and from said stock or shares in said Canada Improvement Company, standing in the name of said Charles Currie Gregory, and all claims, payments, calls, or demands thereunder or under any of them, and of and from all actions, debts, contracts, agreements, and demands whatsoever in law or in equity, which against him, his heirs, executors, or administrators, the said Canada Improvement Company ever had, now has, or which it or any creditor or creditors of said Company can, shall, or may have for or by reason of the said contract or agreement or said bond or said stocks or shares or any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date hereof.

“And the said Canada Improvement Company, and the Halifax and Cape Breton Railway and Coal Company do hereby each jointly and severally covenant and agree to indemnify and save harmless the said Charles Currie Gregory and the said John Pickard and John James Fraser, their and each of their executors, administrators and assigns, from the claims and demands of any person or persons who may have been, or now is or are, the holder or holders, assignee or

assignees of said Bond, made by said Charles Currie Gregory and John Pickard and John James Fraser, and to procure and deliver up the same forthwith to the said Charles Currie Gregory.

"It is further agreed by and between the said parties hereto, that the said Canada Improvement Company shall and will respect and protect the rights of all persons who shall or may have sleepers or fencing, fence poles or other materials upon or near to said railway, intended for said Charles Currie Gregory, to be used in the works undertaken by him under said Indenture, but which have not been accepted by said Charles Currie Gregory in the final returns of his engineers, and paid for by him, the sleepers paid for and accepted by said Charles Currie Gregory being set forth in the paper marked A, hereunto annexed, and the fencing paid for and accepted by said Charles Currie Gregory being set forth in paper B, hereunto annexed, and that said persons and each of them shall have a reasonable opportunity of selling said sleepers and materials to said Canada Improvement Company, and of contracting with the said Canada Improvement Company for the erecting said fence poles and materials in the fencing of said Railway, as far as the same will go, and at rates not less than those previously agreed to in the contracts for sleepers, materials, and fencing, between the said respective parties and the said Charles Currie Gregory, and upon similar terms, but the said sleepers, materials, or fencing so required to be purchased or erected into fencing, not to exceed, with that already paid for by Charles Currie Gregory, the total amount embraced in the contracts of the respective parties with Charles Currie Gregory.

"And the said Canada Improvement Company and Halifax and Cape Breton Railway and Coal Company do hereby further covenant and agree to indemnify, protect, and save harmless the said Charles Currie Gregory, his heirs, executors, and administrators, of and from all manner of claims, suits, and demands, damages and loss of any nature and kind whatsoever, in consequence of or arising from or connected with the expropriation of the lands and materials taken by him for or in connection with the said Railway under his said contract, or the power of attorney hereinafter referred to as

being held by him, and the statutes incorporating said several companies, and from all land damages and from all suits or other proceedings now pending or hereafter to be brought to test the validity of the proceedings taken to expropriate said lands or to test the legality of the formation of said company or companies, or otherwise.

“ And in consideration of the premises, the said Charles Currie Gregory doth covenant and agree to at once abandon and give up his possession to the said Canada Improvement Company of the line of railway upon which the works under said contract were being done and performed by him from and after this date, and doth hereby assign, transfer, and set over unto the said Canada Improvement Company all his right, title, and interest to the said Eastern Railway Extension and the works done and performed by him thereon, and all the materials placed by him on or near said railway, but not to include his plant, tools, or machinery, or any fence poles, sleepers, or other materials delivered on or near said line, and not accepted by or paid for by the said Charles Currie Gregory, nor to include the materials and property specified in schedule D, hereto annexed.

“ And he hereby further agrees, at the time of the execution and delivery of these presents, to discontinue the several suits brought by him against the said Sir Hugh Allan and the Honorable John Hamilton, as aforesaid, each party to pay his own costs in each of said actions.

“ And in further consideration of the said premises, he, the said Charles Currie Gregory, for himself, his heirs, executors, administrators, and assigns, doth covenant and agree to release, and doth hereby remise, release, and forever discharge the said Halifax and Cape Breton Railway and Coal Company, the said Canada Improvement Company, their successors and assigns, and each and every of them, and the directors of said company, and each and every of them, and each and every of their heirs, executors, administrators, and assigns, especially the said Sir Hugh Allan and the Honorable John Hamilton and the said Harry Abbott, of and from the said contract or agreement, and all claim, payment, or demand thereunder, and of and from all actions, debts, contracts, agreements, and demand whatsoever, in law and in equity, which against them

or any or either of them, their or any or either of their successors, assigns, heirs, or administrators, he ever had, now has, or which he, his heirs, executors, administrators and assigns, hereafter can, shall, or may have, for or by reason of the said contract or agreement, or any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date hereof, saving always his right and claim to the said cash and bonds and the other conditions and agreements which form the consideration upon which these presents are executed by the said Charles Currie Gregory; this release, however, to be contingent upon the payment in full of said promissory notes so delivered to said Charles Currie Gregory, as hereinbefore recited, and not to affect his claim to indemnity for anything heretofore done by him, in and under said power of attorney hereinafter referred to as held by him.

"It is nevertheless understood and agreed that the said Charles Currie Gregory is to retain all moneys paid him by the said Canada Improvement Company and by the said Government, and of which the said companies have been made aware either before or after the notice of annulling the power of attorney hereinafter referred to, and the considerations given or secured to him or simultaneously with this agreement, to be possessed and enjoyed by him over and above all considerations, moneys and advantages already received by him without any offset, deduction, or depreciation whatsoever; and it is agreed that no question shall be raised adversely to him as to any act or neglect of his, or as to the quantity, quality, or sufficiency of any material, work, structure or service, done or executed by the said Charles Currie Gregory under the said indenture.

"And the said Charles Currie Gregory hereby further covenants forthwith to deliver over to the said Canada Improvement Company all property of either that Company or the said Halifax and Cape Breton Railway and Coal Company now in the possession of the said Charles Currie Gregory, including all or any plans, profiles, books, and documents of all kinds; but this is not taken or to be taken to include any measurement, note, field memorandum, letter, or account books of said Charles Currie Gregory, or his Engineers, or any books, plans or documents other than those which are in fact

or by the terms of the said contract entered into by him as aforesaid, the property of one or either of said companies.

And the said Charles Currie Gregory hereby further covenants to give all aid and assistance within his power in procuring the legislation hereinbefore referred to, and not in any way to obstruct the construction of said railway apart from any legal rights he may have in and under this agreement.

And the said Charles Currie Gregory hereby acknowledges that the power of attorney formerly held by him from the Halifax and Cape Breton Railway and Coal Company, authorizing him to enter upon lands required for said railway, and to draw the government subsidy and otherwise, has been cancelled by the said company, and that he has no power or right henceforth to act thereunder.

In witness whereof in execution of these presents the respective seals of the said Canada Improvement Company and the Halifax and Cape Breton Railway and Coal Company have been hereto affixed by the respective presidents and secretaries thereof, and the said Charles Currie Gregory hath hereto his hand and seal set and affixed on the day and year first above written.

Sealed by the said Companies }
in the presence of }

The Halifax and Cape Breton Railway and
Coal Company (Limited). [L.S.]

(Sgd.) p. HUGH ALLAN, *President*.
WM. B. ROSS, *Secretary*.

(Sgd.) p. JOHN HAMILTON, *President*.
The Canada Improvement Company (Limited.)

(Sgd.) H. ABBOTT, JR., *Acting Sec'y*. [L.S.]

Signed, Sealed and Executed }
by the said Charles Currie } (Sgd.) CHAS. C. GREGORY.
Gregory, in the presence of } [L.S.]

(Sgd.) SAM. G. RIGBY.

"That in and by said Indenture of the 31st day of October, A. D. 1876, referred to in said Deed or Articles of Agreement, as having been made between Harry Abbott of the one part, and the Commissioner of Public Works and Mines, on behalf of the Province of Nova Scotia, of the other part, it was stipulated that as part of the consideration for the construction of the said railway, the said Harry Abbott, was to receive a transfer of the line of railway from the town of Truro to the town of Pictou, called and known as the "Pictou Branch," subject to the conditions and stipulations in said Indenture; that whereas the said "Pictou Branch" was under the control of the Government of the Dominion of Canada, and the grant thereof which the said Harry Abbott was to receive in aid of the construction of said railway by him so contracted to be constructed, was to be made to him by the said Dominion Government, under certain orders in Council and statutes of the Dominion, passed and to be passed in respect thereof, and the said Harry Abbott not being willing to undertake the construction of said railway, or the fulfilment of the other obligations imposed upon him, without receiving the said railway free and clear of all encumbrance or burthen, as a part of the consideration for such construction; and that whereas the said Harry Abbott had claimed that he was entitled to receive delivery of the said Branch Railway as a condition precedent to the commencement of work under said indenture, and had proposed to accept such delivery upon conditions stated by him in writing, but that such immediate delivery was objected to by the Government of the Dominion, and that it was believed that delivery of the said Branch Railway could be obtained so soon as the said Harry Abbott should have performed the obligations imposed upon him by said indenture, in respect of work, services and materials done, performed and delivered, mentioned in said indenture, and in the specifications thereunto annexed, in which should be included such rolling stock and plant, as he should provide in accordance with such specification in advance of the construction of the said Extension Railway, to be used upon said branch pending such construction, and afterwards upon the whole railway to be composed of the said branch and of the

said Eastern Extension Railway, such work, services, materials, rolling stock and plant, to be to the extent and value of four hundred thousand dollars currency, at the rates and prices fixed for such work and services and materials respectively contained in the schedule annexed to said indenture, and that said Harry Abbot was willing to commence and proceed with the said work upon that understanding, it was then alleged and covenanted in and by said indenture to be understood, and that said presents further witnessed that the delivery of the said "Pictou Branch" to the said Harry Abbott would be made at the time and upon the aforesaid expenditure of the said sum of four hundred thousand dollars being so made, and on the said conditions hereinbefore set forth, and that in default thereof, and until such delivery thereof should be so made as aforesaid, the said Harry Abbott should not be bound further to proceed with the work contemplated by said indenture, and if such failure of delivery should continue for six months after the said last mentioned amount of work and services should have been performed by the said Harry Abbott, there should then be paid to him the balance of the value of the rates aforesaid of the works and services performed and the materials delivered as aforesaid, under and in performance of the said indenture, after deduction of the amount then already advanced to him in respect thereof; but if within twelve months after such failure to deliver the said branch, delivery of the said branch should be made or duly tendered to said Harry Abbott, then and in that case he should be bound to proceed with the said work under the said indenture, a corresponding extension of time for the completion thereof being granted to the said Harry Abbott, provided the Legislature of Nova Scotia should grant the same.

"That said transfer made to the said defendant, the Halifax and Cape Breton Railway and Coal Company, by said Harry Abbott of said contract, and all his right, title, and interest in and to the same, was so made with the consent and approval of the Governor-in-Council.

"That in and under said indenture of the 22nd day of December, A. D. 1876, referred to in the said deed or articles

of agreement as having been made between the defendant corporation, The Canada Improvement Company, of the first part, and the plaintiff, of the other part, the intention thereof was alleged to be that the plaintiff should completely prepare the said road-bed in the manner specified to the satisfaction of the Government Engineer and to the entire exoneration and discharge of said Harry Abbott; and it was also therein stipulated and agreed that the plaintiff should take all necessary steps to obtain possession of the right of way for said Railway Extension, for which purpose the said defendant corporation, The Canada Improvement Company, undertook to obtain for him, and did so obtain, the authority of said defendant corporation, The Halifax and Cape Breton Railway and Coal Company, limited, in such form, and conferring upon him such powers as to enable him effectually to take such proceedings under the statute in such case made and provided under and by virtue of which the plaintiff did accordingly enter upon lands for the right of way of said Extension Railway, and filed plans and took all the proceedings necessary for acquiring said lands for and in the name of said defendant corporation, and more than six months before the making of said deed or articles of agreement between him and the defendant hereinbefore set forth, he, the plaintiff, had so far progressed with said work on said railway that more than four hundred thousand dollars worth thereof had been done, and sufficient to entitle said defendant corporation, the Halifax and Cape Breton Railway and Coal Company, limited, to have said "Pictou Branch" delivered to them under the terms of said indenture of said 31st day of October, A. D. 1876, and all conditions were then fulfilled, and all things had happened and all times had elapsed necessary to entitle said Company to have the same delivered to them; but the same was not so delivered, and has never yet been delivered to them.

"That before the committing of the grievances hereinafter alleged, more than five and one half miles of said Extension Railway so agreed to be constructed by said Harry Abbott under said indenture hereinbefore referred to had been so constructed, and was opened and being worked and operated by the Halifax and Cape Breton Railway and Coal Company, limited.

"And the plaintiff says that after the making of the said deed or agreement between him and the defendants as aforesaid, he, the plaintiff, did abandon and give up possession to the said Canada Improvement Company of the line of railway upon which the works under said contract referred to in said deed or agreement were being done and performed by him as therein set forth, and did also discontinue the several suits brought by him against the said Sir Hugh Allan and the Honorable John Hamilton, and did also deliver over to the said Canada Improvement Company all property of either that Company or the defendant Company in his possession at the time of making of said deed or agreement, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have said deed or agreement performed by the defendants, and to maintain this action for the breach thereof hereinafter set forth; yet the plaintiff says that the defendants have not performed their part of said deed or agreement, and that the said Canada Improvement Company has not delivered to him \$80,000 in good, sufficient, legal, and available first mortgage bonds of said Halifax and Cape Breton Railway and Coal Company, which bonds could have been long since legally issued."

No objection was taken to the sufficiency in law of either of the counts; indeed, no such exception could have prevailed, if taken, and it remains to be seen what the different breaches are, as assigned, how far the material allegations are denied by the pleadings, and what the evidence is in support of such of them as are put in issue. We have already seen what the first count is, and the breach assigned in the second is:—

"Yet the plaintiff says that the defendants have not performed their part of said agreement, and have not used every diligence to cause and procure the issue of \$80,000 of good, sufficient, legal and available first mortgage bonds of said defendant company, so that the same might be delivered to the plaintiff in compliance with the terms of said agreement, and which should so far as the defendants could make them attach and be a first lien upon the said Truro and Pictou Branch Railway, the said Eastern Railway Extension, and also upon said company, and upon the property, rights and privileges

set forth in said section 32 of said Act incorporating said defendant company, and so that no other bonds, mortgages, stock, shares, lien, charge, or other security should take precedence of the said bonds so agreed to be given to plaintiff."

In the third it is :—" Yet the plaintiff says the defendants have not performed their part of said agreement, nor have they used every diligence to cause the said eighty thousand dollars of good, sufficient, legal and available first mortgage bonds of said defendant company, to be legally issued and delivered to the plaintiff at the time, in the manner, and of the character, description and value set forth in said deed or agreement, but to the contrary have delayed the work upon said Eastern Railway Extension, so that sufficient thereof should not be completed to entitle them to issue said bonds in compliance with said act of incorporation, and have created and given certain other liens and securities upon said property, upon which said mortgage bonds were agreed to attach and be a first lien upon said property and no mortgage bonds can be issued or delivered to the said Charles Currie Gregory, over which said liens and securities so created and given by said defendants as aforesaid, will not take precedence."

The fourth is :—" Yet the plaintiff says that the defendants have not performed their part of said agreement nor have they used every diligence to cause the said eighty thousand dollars of good, sufficient, legal and available first mortgage bonds of said defendant company, to be legally issued and delivered to the plaintiff, at the time, in the manner, and of the character, description and value set forth in said deed or agreement; but to the contrary, after the making of the said deed or agreement in the first count set forth, the defendant, the Halifax and Cape Breton Railway and Coal Company, on or about the 1st day of February, A. D. 1879, entered into an agreement with Her Majesty the Queen, represented as to the Dominion of Canada by the Minister of Public Works and Mines, and represented as to the Province of Nova Scotia by the Commissioner of Public Works and Mines, by and under which defendants agreed to relinquish their rights to said "Pictou Branch" Railway, and that an Act of the Dominion

Parliament should be passed repealing the act then in force, providing for the transfer of said Pictou Branch to said defendant, and that said act so to be passed should also provide that said Pictou Branch should be retained by the Dominion Government until the said Eastern Extension Railway to the Strait of Canseau and the steam ferry across the Strait should be completed, equipped and established ; and further providing that upon such completion the said Pictou Branch should only be conveyed to the said defendant upon the following, among other terms and conditions :—

“That in the event of the said existing contract for the construction of said railway with any modification thereof that might be agreed to by the defendant company and the Nova Scotia Government not being performed to the satisfaction of such Government, and the said Eastern Extension Railway and Ferry not being completed, equipped, and established in accordance with said contract, or in the event of the failure of defendant company for a period of three months to operate said Railway and Ferry effectually and continuously, to wit : by running at least one passenger train over the whole line each way daily, except Sundays, and such freight trains as might be sufficient for the conveyance of the freight offered for carriage, and the Ferry, in such a manner as to connect with the passenger trains the two lines of railway, including the ferry, should become the property of the Nova Scotia Government, free from any incumbrances of any kind whatsoever created by defendant company, (the power of defendant company to create incumbrances being declared by said agreement to be made subject thereto,) and thereafter the defendants applied for and obtained the passage by said Dominion Parliament of an Act in compliance with the said terms of agreement so made with Her Majesty the Queen as aforesaid, and the defendants did also by and under the said agreement with Her Majesty the Queen, agree that the Government of Nova Scotia should recommend the passage of an act authorizing the completion of the arrangement in respect of the Pictou Branch hereinbefore set out and in pursuance of said agreement the passage of an Act of the Legislature of Nova Scotia was obtained, in which it was enacted among other

things, that in the event of the contract under which the defendants had agreed to build said Eastern Railway Extension with any modification thereof not being performed to the satisfaction of the Government of Nova Scotia, and the said Eastern Extension Railway and Ferry not being completed, equipped and established in accordance with the said contract, or if after the completion, equipment, and establishment thereof, and the acquisition by the said Company of the Truro and Pictou Railway, the said company, their representatives or assigns, should fail for a period of three months to operate the said two lines of railway, or either of them, or the said ferry, efficiently and continuously, to wit, by running one passenger train over the whole line each way each day, except Sundays, and such freight trains as might be sufficient for the prompt conveyance of the freight offered for carriage; and the ferry, in such manner as to connect with the passenger trains passing over the said railways, the said Eastern Extension Railway and Ferry and appurtenances should thereupon, by virtue of said act, cease to be the property of the company, and the Nova Scotia Government might receive a transfer thereof from the Government of Canada, and both said railway and said ferry should thereupon be free from any incumbrance of any kind whatsoever created by defendant company, its representatives and assigns, all of which incumbrances should thereupon cease to have effect; and should become extinct; and it was also in said act further declared that the authority of defendant company to issue mortgage bonds upon said railway, and upon said Pictou Branch Railway, if acquired by them with their respective equipments, tolls, and revenues, and all mortgage bonds issued, and other charges and incumbrances and liens created by such authority, should be subject to the terms of said act, and also of said Act of the Dominion Parliament hereinbefore referred to as passed in compliance with the terms of said agreement made by defendant company with Her Majesty the Queen; and although the plaintiff opposed the passage of said legislation, and requested that his rights should be protected, and said bonds to which he was entitled should be excepted from the operation thereof, yet the defendants opposed and resisted

said action of the plaintiff, and required and insisted that said legislation should be passed without reference to the rights of the plaintiff or said bonds to which he was entitled as aforesaid."

And the fifth is:—"Yet the said defendant corporations have not, nor have either of them, used every diligence to obtain the issuing of said bonds and the delivery of them to the plaintiff, and plaintiff has not received the same"

To this declaration the defendant first pleaded twelve pleas, the third, fourth, fifth, sixth, ninth and tenth of which appear to have been intended to let in defences which are still relied upon under the remaining pleas; but those first enumerated were demurred to and set aside, *2 R. & G.*, 381. Of the remaining pleas first pleaded the first and second only deny the execution of the agreements mentioned in the declaration, and the eleventh and twelfth are pleaded to the sixth count, which was abandoned at the trial. The eighth plea is only to the third count; so that the seventh is the only one of the pleas first pleaded, and still remaining on the record, which purports to answer the first, second, fourth, and fifth counts, excepting, as already mentioned, a denial of the execution of the agreements. It is proper to mention that there is an added plea, to the fourth count, which denies that the defendant entered into the agreements in that count mentioned, or any of them. The following are the pleas now remaining on the record of those first pleaded:—

"The Halifax and Cape Breton Railway and Coal Company, (Limited,) by J. Norman Ritchie, its Attorney, as to the first, second, third, fourth, fifth and sixth counts of plaintiff's declaration, says that the alleged deeds are not, nor are any of them the deed or deeds of the said defendant company.

"2. And for a second plea as to said first, second, third, fourth, fifth and sixth counts, said defendant company says that it did not undertake and promise as alleged.

"7. And for a seventh plea as to said first, second, third, fourth, fifth and sixth counts, said defendant company says that defendants used every diligence to have said bonds issued and delivered to the plaintiff.

"8. And for an eighth plea as to said third count, said defendant company says that defendants did not delay the work upon said Eastern Railway Extension so that sufficient thereof should not be completed to entitle them to issue said bonds, and said defendant company has not created or given lien or securities upon said property as alleged.

"11. And for an eleventh plea as to said sixth count, said defendant company says that it did not fraudulently, wilfully or falsely make any representations to the plaintiff as alleged.

"12. And for a twelfth plea as to said sixth count, said defendant company says that all the recitals contained in said agreement and the representations, if any, made by said company before or at the time of the execution thereof were not false but were true and correct in every particular."

J. N. RITCHIE,

Attorney of Halifax and Cape Breton Railway
and Coal Company, (Limited.)"

"And for an added plea to fourth count as amended, the said Halifax and Cape Breton Coal and Railway Company, a defendant company herein, says that it did not enter into the alleged agreements or any of them or undertake and agree as alleged.

J. N. RITCHIE, *Atty. of Defendant Co.*"

The added pleas limiting the defence to \$40,000, are these:—

"And for an added plea to said declaration as to one half of the first mortgage bonds, viz., forty thousand dollars, the Halifax and Cape Breton Railway Company, a defendant company herein, says that before this suit the said plaintiff assigned said bonds and all his interest therein and right to receive the same to the Honorable P. Carteret Hill, then Provincial Secretary of Nova Scotia, and gave the said P. Carteret Hill an order to receive the same from the Canada Improvement Company, (limited,) who accepted the said order and then became liable to deliver the said bonds to the said P. Carteret Hill, and said assignment and order remained in

full force and effect at the time the writ in this suit issued, and this suit is not brought for the benefit of the said P. Carteret Hill or with his consent.

“And for a second added plea to said declaration, as to one half of the first mortgage bonds mentioned in said declaration, viz., forty thousand dollars, the Halifax and Cape Breton Railway Company, a defendant company herein, says that before this suit the said plaintiff assigned said bonds and all his interest therein and all right to receive the same to the Government of Nova Scotia, and gave P. Carteret Hill, then Provincial Secretary of Nova Scotia, an order to receive the same on behalf of said Government from the Canada Improvement Company, (limited,) which company accepted the said order and then became liable to deliver the said bonds to the said P. Carteret Hill as representing the said Government of Nova Scotia, and said assignment and order remained in full force and effect at the time the writ in this suit issued, and this suit is not brought for the benefit of the said P. Carteret Hill or the Government of Nova Scotia, or with his or their consent.”

It is necessary to see, whether or not, under the first pleas, and independently of the added ones, which are only to half of the plaintiff's claim, he would have been entitled to recover the full amount, and, if he would, then, whether or not the evidence under the added pleas is such as to discharge the defendant from one half of the liability. But, first, it is well to deal with some objections raised at the trial and argument, on the part of the defendant. It has been contended that the plaintiff should have become non-suit, because, as it is said, the suggestion entered upon the record, that the Canada Improvement Company was absent out of the Province when the writ of summons was issued, and, on that account, could not be served with process, was not proved at the trial, under sections 347 and 350 of Chapter 94, *Revised Statutes*, 4th Series, the latter section providing that “the truth of such suggestion shall be enquired into at the trial, and, if found against the plaintiff, he shall become non-suit.” And it is further contended that the Canada Improvement Company could have been served, even out of the Province, under sec. 41,

chap. 12, of the Canada Joint Stock Companies Clauses Act of 1869, which is made applicable, in this case, by the act incorporating the company; *Statutes of Canada, 1872*, chap. 119, sec. 9. It provides that service of all manner of summons or writ whatever upon the company may be made by leaving a copy thereof at the office or chief place of business of the company, with any grown up person in charge thereof, or elsewhere with the president or secretary thereof; or, if the company have no known president or secretary, then, upon return thereof duly made, the Court shall order such publication as it may deem requisite to be made in the premises, for at least one month, in at least one or two newspapers; and such a publication shall be held to be due service upon the company." The last part of this section is important as showing the intention of Parliament as to the officer who should serve the writ in the manner prescribed. I think that Parliament, when using the words, "upon return thereof duly made," meant the return of the officer to whom the writ was directed, who, with us, is the "Sheriff of the County of ———, or any other of our sheriffs;" and whose functions and duty are confined to matters within the bailiwick, and to make returns, accordingly, to such writs as may be placed in his hands, requiring such returns. It would be futile if this Court were to command a sheriff to step, not only beyond the limits of his bailiwick, but to go beyond the jurisdiction of the Court as well, to effect service there of process like this or to make a return of something which he is not, in law, presumed to know. Of course, if the parties are found within his bailiwick, he can effect service, though the place of business or residence is beyond the jurisdiction; but that he can do without the aid of a statute, and it would be manifestly improper to command a sheriff to do an act which he is not legally liable to perform, so that he could legally treat the command with indifference, if not with contempt.

It has been intimated that, under the statute, the writ may be legally served by *any* person in the manner prescribed; but the statute does not say so, and I cannot think that Parliament intended anything of the kind. On the contrary, it appears to me that the return mentioned in the

Joint Stock Companies Clauses Act means the official return of the officer to whom our Practice Act, (*Revised Statutes*, chap. 94, section 25 and Schedule A., No. 1,) requires such writs to be directed, and for the correctness of which return the law holds him amenable. The statute uses the words "all manner of summons or writ," as those that may be served in the manner prescribed, and this, necessarily, embraces a variety of summonses and writs, service of which outside of the jurisdiction would be unavailing, because the Court would have no power to enforce obedience to them at all; and I cannot think that Parliament intended, even if it had the power in this case, to extend the jurisdiction of Provincial Courts beyond the previous limits, or to give any weight or validity to the acts or returns of their officers beyond that which they always had,—but simply to prescribe the *manner* in which, and the parties upon whom service should be effected, by the persons formerly appointed for the purpose, and within the limits formerly assigned,—leaving, untouched, the jurisdiction of the different Courts to enforce obedience to their process when necessary. At the argument it was urged, on behalf of the plaintiff, that it is not open to the defendant company to take exception, on the ground that the suggestion was not proved, inasmuch as the fact appears upon the record, not denied, and I think the law is so. In *Bartlet v. Pentland*, 1 B. & Ad., 704, it was laid down that "whenever a person not party to the record is to be affected by the judgment to be given, or *whenever the judgment upon the record* is to be such as would *not be ordinarily* warranted by the previous proceedings on the record, there must be a suggestion made by leave of the Court, in the proper form, *so as to afford an opportunity to the party to be affected by it to demur*, if he thinks the facts suggested are insufficient in point of law, *or to plead, if he means to deny them.*" And that was the case of a suggestion, after judgment against the secretary, to issue execution against another member of a company. It is valuable as giving the general principle, in cases of this kind, whether the suggestion be before or after trial, and whether by leave of the Court or otherwise. In *Patterson v. Davis*, 6 C. B., 235, a suggestion was entered, by leave of the Court,

after judgment, to deprive the plaintiff of costs, under a statute, and after previous application to a Judge at Chambers. The suggestion was demurred to and held bad in point of law. It was said at the argument that the suggestion was not traversable, and one of the learned Counsel argued that it should not have been pleaded to; but the principle in *Burtlet v. Pentland*, as I think, settles that point. Besides, we find that the cases in which it is not traversable are pointed out in *Chitty's Arch. Practice*, 12th ed., 1568, where it is said that "when the matter of suggestion belongs to the Court, and has to be decided by them, the suggestion cannot be traversed. Thus, for instance, a suggestion entered in a local action, for the purpose of having the trial in a different County to that in which the venue is laid, cannot be traversed." But this is not that case, as the question whether or not the Canada Improvement Company was within the jurisdiction is one of fact, not belonging to the Court, and, therefore, in my opinion, traversable. It is said that, under our Practice Act, the truth of the suggestion must be enquired into at the trial, traverse or no traverse, and if found against the plaintiff he shall become non-suit. But how would it be if the suggestion was not sufficiently stated in point of law? The defendant would, I take it, demur; otherwise, according to the view urged for the defendant himself, it would be enough to prove the truth of it, as laid, though not sufficient, and if it is not only allowable, but necessary, in such case to demur, I cannot see why it is not both allowable and necessary to deny the truth of it upon the record if it is intended to insist that it is not true in point of fact. I am of opinion that when the Legislature enacted that the truth of the suggestion should be enquired into at the trial it was simply intended to fix the time and place of enquiry when put in issue by a plea, but not to make it imperative to enquire into it as a matter of fact appearing upon the record not denied, and therefore admitted to be true. In *Barnwell v. Sutherland*, 9 C. B., 380, it was contended that under the words of section 12, 7 G. 4, chapter 46, no suggestion was necessary, and that a mere memo. upon the *nisi prius* record stating the facts was sufficient, because the words of the statute did not

require such suggestion. That section provides "that any judgment recovered against any public officer of the co-partnership shall have the like effect and operation against the property of every member thereof as if judgment had been obtained against the co-partnership;" but it was held that, notwithstanding the statute required no suggestion, the entry was irregular, and the verdict was set aside. So, I think, it is in this case. Although the statute does not expressly require a traverse of the suggestion, it by no means dispenses with the necessity of that traverse, under the existing practice of the Court, so as to put in issue a question of fact which, if it be as it is contended, lies at the root of the plaintiff's right to recover against the Halifax and Cape Breton Railway and Coal Company, one of the original defendants. But, apart from that, I think the plaintiff has quite sufficiently proved the truth of the suggestion, and I cannot see how it can be fairly contended that service upon Mr. Abbott, or by leaving a copy of the writ at his office in New Glasgow, would have been good service upon the company. That office clearly, was not "the chief place of business" of the Company, nor was Mr. Abbott "the president or secretary thereof."

It was objected that there is no proof of the seal of either company, so as to justify the reception, in evidence, of the agreement upon which this action is brought, and, in answer to that objection, section 152 of our Practice Act was relied upon by the plaintiff. By that section "the general issue and all general pleas are abolished, and every pleading shall specify, particularly and concisely, the facts intended to be denied;" but the general issue is the very plea relied upon here by the defendant, and the fact now attempted to be denied, namely, the proper sealing, is not *particularly specified*. As well might it be said that the Statute of Frauds which, before the passing of our Practice Act, could have been taken advantage of under the plea, is still available, without any other plea, for reasons similar to that urged in this case, that is, that the alleged deed is not a deed at all, if void under the statute, and, therefore, not defendant's deed; but this, I assume, cannot be successfully contended, otherwise our Practice Act, so far as it relates to pleadings, would be valueless. Again,

section 138 provides that "in actions on specialties and covenants, the defendant's plea that the alleged deed is not his deed, shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be *specialty pleaded*, including matters which make the deed absolutely void, as well as those which make it voidable." The contention here is, not that in point of fact, there was no signing and sealing of the deed, upon which the evidence is clear, but that the seals used were not proved to be the seals of the companies. That is the alleged point which, as it is contended, makes the deed void, and, therefore, the one to which, under our statute, the plea should have *particularly* directed the attention of the plaintiff if the fact was intended to be put in issue; else why abolish the general issue and *all general* pleas and require so much particularity? The second plea does not assist the defendant in this contention.

I do not think that this company, any more than a private individual, is at liberty to accept the benefit of a contract, as here it undoubtedly did, and then attempt to ignore its obligation to give the stipulated equivalent, upon the ground that the seal attached to the agreement was not the proper seal,—in other words, that the head of that company, acting within his functions as such, deceived the other party to the deed to his prejudice, by using a false seal in its execution, as he must have done here if the seal used was not the genuine one,—because, the evidence is that *a seal* was attached to the deed when signed. The general rule of law, that a corporation contracts under the common seal, has been very much modified by *Church v. The Imperial Gas Light Co.*, 6 Ad. & El., 846, (in error,) so as to dispense with the necessity of affixing the common seal to agreements in cases like this. It was there laid down by DENMAN, C. J., that "wherever to hold the rule applicable would occasion very great inconvenience or defeat the very object for which the corporation was created, the exception has prevailed, namely, to dispense with the necessity of using the common seal." In that case it was held not only that a corporation might maintain *assumpsit* upon executed contracts, but upon executory contracts of a certain kind as well, though the contract was not under the common seal;

and I think it cannot be doubted, under the evidence, that a strict application of the rule here, even if the common seal had not been used, would not only cause very great inconvenience, but seriously interfere with, if not defeat the object for which the corporation was created. The agreement upon which this action is brought, was made to remove the difficulty which stood in the way of completing and operating the road in question, by the company getting possession of the work, together with the fruit of the plaintiff's labor, large expenditure, and the personal property mentioned in the agreement, not to speak of the releases of actions which he then had pending against two of the principal parties interested in forwarding the work. If the contract was not binding upon the defendant, neither was it binding upon the plaintiff, whose rights, for aught that otherwise appears, must in that case be the same to-day as immediately before the agreement was signed, to all the property then handed over by him to the defendants, in pursuance of that agreement, together with his right to prosecute the suits then agreed to be discontinued; but this is not pretended either on one side or the other. In the case just referred to, the learned Chief Justice, DENMAN, refers to the judgment of PATTESON, J., in *Beverly v. The Lincoln Gas Light and Coke Co.*, a short time before then delivered, (6 Ad. & El., 829,) the reasoning in which is quite unanswerable, and is equally applicable in this case. In *Doe e. d. Pennington v. Tunier*, 12 Q. B., 1012, Lord DENMAN said that "to enforce an executory contract against a corporation it might be necessary to show that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that is necessary to make it a binding contract upon both parties, they having all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed,—it is merely raising a presumption against them, from their acts, that they contracted in such a manner as to be binding upon them, whether by deed or otherwise, and we are are not aware of any decision or authority against this view of the case." Again, in *Saunders v. The Guardians of St. Neott's Union*, a body corporate, 8 Q. B.,

811, Lord DENMAN said: "a motion, in this case, was made for a new trial on the ground that no contract under seal was proved against the defendants;" but we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for purposes connected with the corporation. There are several other cases to the same effect. (See *Taylor*, 6th ed., 872-3.) Further, *Taylor*, p. 159, says: "Moreover, when a deed is executed by a corporate body, the *common seal* need not be used, but the corporation may, if it think fit, *adopt any private seal* for the occasion; and the jury may presume that the use of the adopted seal was a corporate act, if the instrument purport to be executed by the head and subordinate members of the corporation. For this he cites *11 Irish Law Reps.*, 435. But if any question still remained on this point the statutes, both of Canada and of this Province, appear to me decisive. The Canada Improvement Company was incorporated by Chapter 110, Canada Acts, 1872, and the last section makes the Canada Joint Stock Companies Clauses Act applicable to it, except in so far as they may be inconsistent. And by section 31 of the last mentioned act, it is provided that "every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted, or endorsed, and every promissory note and cheque made, drawn, or endorsed on behalf of the company, by any agent, officer or servant of the company, in general accordance with his powers as such, under the by-laws of the company, shall be binding upon the company; and, in no case shall it be necessary to have the seal of the company to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or endorsed as the case may be, in pursuance of any by-law or special note or order," etc. The last part of the section I omit, as it has no bearing upon the question. And even without this enactment it would, as I think, be unnecessary to prove the authority of the officer to enter into the particular contract, although there was no seal, so long as the transaction appears to be within the scope of his position; *Addison on Contracts*, p: 92. Again, the other company, the Halifax and Cape Breton Railway and Coal Company, was incorporated

by an Act of the Provincial Legislature, 1876, chapter 74, which is silent as to the use of a seal. That act is subject to the "general provision respecting corporations," *Revised Statutes*, chapter 53, which, by the 15th section, provides that "the acts of incorporated companies, performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or be authenticated by, the seal of such corporations." Moreover, I think, that the evidence leaves no doubt of the authenticity of the seals used, and that the agreements were properly received in evidence.

All the necessary allegations and averments, if true, are contained in the first count, to entitle the plaintiff to recover, the breach being, as we have seen, that the "Canada Improvement Company has not delivered to him, (the plaintiff,) \$80,000 in good and sufficient legal and available first class mortgage bonds of the said Halifax and Cape Breton Railway and Coal Company, which could have been long since issued." And the only plea to this, except as to the execution of the agreements, already referred to, is that the defendant used every diligence to have the said bonds issued and delivered to the plaintiff, although, by the agreement, they covenanted and guaranteed, as alleged in the count, not alone that they would use such diligence, but that the "Canada Improvement Company would deliver to the said Charles Currie Gregory, said bonds of the Halifax and Cape Breton Railway and Coal Company, at the time and in the manner, and of the character and value thereinbefore specified."

The plea answers only a part of the count, which part, if left out, would still leave a good cause of action unanswered. The plaintiff may recover though he prove a part of the breach as laid; 1 *Chitty on Pleadings*, 346; see also, 311, 317, 324; and *Bernard v. Duthy*, 5 Taunt., 27; *Fortz v. Imber*, 6 East., 437; *Jones v. Clayton*, 4 M. & S., 349.

The 7th plea is, I think, an answer to the breach in the second count; but, unfortunately for the defendant, the evidence shows that no such diligence was used as the plea alleges, and as the agreement required; and the evidence is also conclusive, as I think, in favor of plaintiff under the issues raised in the third count. The important allegations

in the fourth count, and the breaches therein assigned are only answered, as we have seen, by the seventh plea and the added ones, the latter of which, although it denies that the Halifax and Cape Breton Railway and Coal Company entered into the agreements in that count alleged, yet does not deny that the Canada Improvement Company did so; although the former company covenanted that the latter, as well as itself, would use every diligence, as in the count alleged, to cause the bonds to be issued, a result which the agreements referred to in the assignment of breaches were calculated to defeat and, no doubt, did defeat eventually. Upon all the issues raised, so far as they are raised by the pleas, I cannot see how it would be possible for a jury to do otherwise than find a verdict in favor of the plaintiff. Although it was objected that evidence was improperly rejected and other evidence improperly received, no authority was cited to show that such was the case, and if the ruling had been different I am still of opinion that it would have been wrong. Further, whether the evidence tendered, excepting the agreements, had been rejected or received, the result would, of necessity, have been the same.

The defendant relies upon the Act passed in 1879 by the Legislature of Nova Scotia, so far as relates to the security agreed to be given on the Eastern Extension Road, and *Brown v. The Mayor of London*, 9 C. B., N. S., 828, was cited to show that an obligator was relieved of his liability when a fulfilment of his obligation was rendered impossible by an Act of Parliament; but the two cases and the two statutes are very essentially different. In that case, the act relied upon was passed for the purpose of settling conflicting claims between the Crown and the large Corporation of London, in respect to the right of the soil and the bed of the river, over which the defendant corporation previously exercised conservancy under other acts of Parliament, passed for the improvement of the navigation of the river, which acts were in force when the bond in question was given. The bond was conditional upon the annuities secured by it being paid out of tolls to be collected by the corporation, in case, as ERLE, C. J. said, these tolls would be sufficient for that purpose. The act relied upon in that case changed the acts under which the bond was given

so as to take the conservancy of the river from the defendant corporation and vest it in a newly created body, in whom all the rights of the Crown and of the corporation were also vested, as well as the power to receive and apply the tolls mentioned in the bond, and all other tolls and dues. It recited that the "preservation of the Thames is of great national" importance, and that the Queen, in right of her Crown, is, or claims to be, seized of the soil of the seas around the United Kingdom, &c., "and also rivers, creeks and arms of the seas, and the ground and soil thereof," &c. It also recited that a suit was pending between the Crown and the Corporation, for the purpose of determining the right of the parties, together with an agreement for the termination thereof. That act was passed to set at rest a question in controversy, not between the obligor and obligee, but between the Crown and the obligor. The corporation gave the bond in pursuance of an existing Act of Parliament which imposed upon it the duties connected with the conservancy of the river, and conferred upon it the power of raising funds to meet the obligation, by levying tolls upon the public; and it would be manifestly unjust if, under such circumstances, Parliament should, even to protect the rights of the Crown, have afterwards divested the corporation of all its powers to collect the tolls and dues, transferring them to another and a newly created body, without that body being, at the same time, liable by process, either at law or in equity, to meet the obligations for the discharge of which the tolls were first authorized to be imposed. And so the Court held, still leaving the burthen of contributing the funds out of which the bond was to have been satisfied upon those who were originally liable to contribute them, namely, those who paid the tolls. ERLE, C. J. said, "several subsequent sections show that it was contemplated that the conservancy fund should be charged upon the tolls before they were transferred to the new body," adding "and that, I think, authorized the conservators to pay these annuities." He previously said, "It seems to me that the attention of the Legislature was not specifically drawn to the rights and liabilities under these bonds. There is no express enactment on the subject, as I cannot help thinking there would have been if it had been present in the

minds of the framers." Again, he says: "But whether the remedy be by action at law, by *mandamus*, or by suit in equity, I do not think there is any practical difficulty in the way of the holders of these bonds enforcing payment out of tolls, if sufficient." WILLIAMS, J. said that the Act, (20 and 21 Vic.,) "is a public act, and therefore, I think, the passage cannot be said to have been procured, by the obligors, so as to bring the case within the rule that the performance of a condition is not excused by reason of its having become impossible of performance where such impossibility of performance has been brought about by the acts or covenant of the obligor itself." WILLES, J. dissented, holding that the plaintiff was entitled to recover, and KEATING, J. concurred with the majority, saying: "It is clear that the tolls are vested in the new body and it seems to be conceded that the statute imposes upon them the obligation, out of those tolls, to pay the bond in question among other charges and encumbrances. How the holders are to enforce their remedy against them, for the purpose of to-day, appears to me to be wholly immaterial. That the conservators are liable to pay these bonds and that the tolls in question are charged with the payment of them seems quite clear, and this seems to be conceded by Mr. Lush." The case was brought up, by writ of error, and is reported in *13 C. B., N. S.*, 828. The judgment below was confirmed, COCKBURN, C. J. saying that "although it may be that some private acts of Parliament amount to no more than private agreements between the parties at whose instance they are passed, we think that cannot be said of an Act of Parliament such as the present which deals with public rights and matters of great public interest." He refers to the imposition, by the act, of tolls upon the public and its effect upon the prerogative of the Crown, to show that it cannot be regarded as a private act. How different the two cases? Here, the prerogative or right of the Crown was not in question. No suit relating to it was pending between the parties or any of them, nor was their position such as to render such a suit possible. The amount claimed by the plaintiff was not payable out of funds to be collected from the public under an Act of Parliament. The defendants, in entering into the contracts now sued upon, were not trustees nor acting as

trustees for any portion of the public. The effect of the act was not simply to change the liability from one corporation to another, without destroying the remedy of the plaintiff, which in that case he mistook; but, if it had the effect contended for, it would be to depreciate and render comparatively valueless, if not destroy, the securities agreed to be given, and to defeat the plaintiff's remedy altogether. The act is not a public act, like the one cited, but a private one, not to settle a public question, but in effect, if at all effective, to destroy the private rights of a private individual on the one hand for the advantage of a private corporation on the other. The recitals contained in the English Act, or anything equivalent, could not, without a palpable violation of the truth, be contained in the Act passed by the Legislature of Nova Scotia and relied upon here. The plaintiff's rights were urged against the passage of such legislation, but although in the words of ERLE, C. J., they were "present in the minds of the framers," they were utterly ignored, as the learned judge thought they would not be, in the case then in hand, without "express enactment on the subject for his protection," and I find it impossible to see upon what principle of justice such an act could be passed, with a knowledge of all the facts, unless the Legislature thought that the plaintiff still retained his remedy under his agreement with the defendant, as he now seeks to enforce it. Further, it cannot be contended that, even if it had the effect claimed, as a defence to causes of action arising after its passage through the Legislature, it could have the same effect as an answer to a cause of action previously existing. No such question arose in *Brown v. The Mayor of London*, and I would be surprised if it did. In that case, even although it was not contended that the act destroyed or depreciated the security held by the plaintiff, but merely that it transferred the liability to pay from one corporation to another, authorized to collect the tolls which were, at first, made available to discharge the obligation—in point of fact, not affecting the plaintiff's rights at all, but giving a remedy against a different body, who succeeded to the trust—yet so abhorrent to the learned judge's sense of justice was the idea of any interference, by Parliament, with the private rights of an individual, though only to the limited extent of changing

the remedy merely, that he felt constrained to express an opinion that the framers of the bill could not have had the facts present to their mind, or those rights would have been more specifically protected. I have looked carefully, in this case, for any of the facts, or anything like them, and for any of the reasons upon which the opinion of the Court, in that case, was based, but I have looked for them in vain. They do not exist. And what has been said respecting the act passed in this Province, so far as it affects the security agreed to be given upon the Eastern Extension Railroad, applies to the legislation of the Parliament of Canada, so far as it affects the securities agreed to be given upon the Pictou Branch, so called.

The other case cited for the defendant on this point, *Daily v Crespigny*, L. R., 4 Q. B., 180, has no application, because, there, the defendant was held not liable, on the ground that the assignment made by him to the railroad company was, under the statute, a compulsory one, which the plaintiff himself would have been obliged to make if he had the fee; and, that being compulsory, he was not liable for the acts of his assignees, though he previously covenanted that neither he nor his assignees would, during the term, permit any messuage, &c., to be built on the place in question. It was not pretended, in that case, that the passage of the act was in pursuance of an agreement made between the defendant and the railroad company, or that he promoted or was a party to it in any way. And further, the defences relied upon were pleaded, in both the cases cited; not so here. The plaintiff is entitled to judgment for the full amount of his claim, unless that amount can be reduced, by one half, under the first and second added pleas.

We have already seen what these pleas are, and the replications are :—

- 1st. Joining issue.
- 2nd. Want of consideration for the assignment.
- 3rd. That it was by parol, without consideration, and was revoked and annulled, averring notice.

“ And for a fourth replication to said first and second added pleas, suggesting as before, plaintiff says that he agreed to give and gave said alleged assignment and order for the

purpose of enabling said P. C. Hill, as such Provincial Secretary, or the Government of Nova Scotia, to recoup the said Government certain sums of money which said Government had theretofore paid without any liability or obligation on their part to do so to divers persons to whom various absconding sub-contractors upon said railway were indebted, and the same was so given and accepted upon the express condition, understanding or agreement, to wit, that it should not be binding upon the plaintiff in the event of any legislation being thereafter passed by the Legislature of Nova Scotia affecting or prejudicing the plaintiff's rights in respect of the first mortgage bonds of the company defendant, and that if any such legislation should be passed the said alleged assignment and order should thereupon be and become void, and plaintiff says that afterwards and while the said condition was in full force and effect, the legislation and acts referred to in the fourth count of said declaration were passed at the instance and request of said defendants and by and with the concurrence and assistance of said Government, whereby the plaintiff was injuriously affected and greatly prejudiced and damaged in respect of the first mortgage bonds of the company defendant, which he had the right to receive under the said agreement, and the said alleged assignment and order became and were and are in consequence thereof invalid and void, and, except as hereinbefore stated, there was no consideration for the said alleged assignment or order or either of them.

"And for a fifth replication to said first and second added pleas, suggesting as before, plaintiff says that said alleged assignment and order were and each of them was given to said Honorable P. C. Hill upon the condition that he should hold the same as the agent of plaintiff and that the same should remain inoperative and of no effect unless and until the Government should deliver up and return to the plaintiff the security bond given by himself as principal and John Pickard and John James Fraser to the Canada Improvement Company which was by said last named company assigned to the said Government, and which is referred to in the first count of said declaration, and also unless and until the said Government should pass a minute of Council undertaking the protection of plaintiff's rights accruing to him under the said

agreement as therein provided for and should also furnish the plaintiff with a copy of such order in Council, and plaintiff says that the said security bond was not delivered to him nor was the said minute or any minute of Council passed by the said Government in that behalf, nor was any copy thereof ever furnished to plaintiff, but on the contrary, the Government refused to return or deliver up said bond or to pass said minute of Council or to furnish the plaintiff with a copy thereof, and he alleges and avers that by reason of the premises the said alleged assignment and order and each of them became and were and are and each of them is inoperative and of no force or effect.

Some questions, which appear to me of importance, were not much discussed at the argument, such as whether or not the bonds, not having an actual existence, could be said to have such "*potential existence*," that any interest in them could pass by any assignment, consistently with the principle which controlled in the case of *Lunn v. Thornton*, 1 C. B., 379. The recent decision of this Court in *O'Kell v. Bell* (*ante* p. 419), was in accordance with the law then laid down and subsequently acted upon; and, although in applying the principle, I cannot at present see much difference between the case of an attempted assignment of non-existing but expected bonds, and the attempted transfer of other expected property or rights, yet I prefer to rest my opinion, as far as possible, upon points which have been argued by Counsel. It may, however, be well contended that there was not, in this case, any effective assignment of the bonds at all; and, in that view of the case, *Burn v. Carvalho*, 1 Ad. & El., 833, goes much further than is necessary for the plaintiff here to go in order to succeed. The head-note of the report gives a correct statement of the case:—"F., a merchant at Liverpool, used to consign goods to his agent at Bahia, in South America, for sale, to draw bills upon the credit of and against such consignments in proportion to their amount, to be paid by the agent out of the proceeds. Some bills so drawn and negotiated by endorsement of a house in London with which F. corresponded, were refused acceptance by the agent. The London agent, thereupon, requested F. to write to his agent at Bahia with orders 'that in case he did not pay F.'s drafts he should, immediately

hand over such property as he might have of F.'s of an equivalent value to the bills not paid by him to the agent of the London house at Bahia.' F. replied that he would write to his agent agreeably to these injunctions, directing him to hand over to the agent of the London house, 'property of F.'s in his hands to cover the amount of bills that eventually might not be paid.' Afterward, and before the letter from F. to his agent reached Bahia, F. became bankrupt. F.'s agent subsequently handed over to the London house goods consigned to him as above mentioned, to an amount less than the bills unpaid; *held*, that there was no legal or equitable assignment of the goods to the London house before the bankruptcy, and that, on that event, the property in them vested in the assignees.

In an action of trover brought by the assignees for the goods, in which the above facts were proved, the defendant also offered in evidence the letter written by F. to his agent at Bahia, (after promising the London House to write as above stated,) in which he ordered that party to hand over all the property which he held on F.'s account to the agents of the London House. *Quære*.—Whether the letter was admissible but *held* that if it was, the decision ought still to be the same." That judgment was based upon the fact that there was "no immediate assignment of any certain and specified amount of property but at most only *an agreement to assign on a contingency* and the goods of an uncertain quantity." In that case the property did exist, the consideration for the transfer appeared upon the face of the letters, the intention to assign also appeared, and the property was, after the bankruptcy, handed over in pursuance of the agreement; while here, the so-called assignment itself, shows no value or consideration, the bonds themselves did not exist and even their being brought into existence at any time depended upon a contingency the happening of which the evidence shows to have been rendered impossible; and, that too, in consequence of the combined action of the government, whose alleged right is now set up by the defendant, and the defendant itself. If the plaintiff had, at any time before this action or even now assigned under a bankrupt law such as the English Act can there be any doubt that the assignees would, according to the judgment just cited, be entitled to the benefit of these

expected bonds, in case they should or could ever be issued, or had such an existence as to make them the subject of an assignment? And, if so, it follows that the plaintiff did not yet part with his right to the bonds either in law or in equity.

But, supposing that the bonds had been issued according to the agreement, and got into the hands of the plaintiff who refused to hand them over to the government, I know of no process by which he could be legally compelled to do so under this evidence. The order to deliver them to Mr. Hill is silent as to the purpose for which they were to be so delivered, contains no words of assignment to any one, nor does it show that any value or consideration was ever given by Mr. Hill or the government. On the contrary it is proved beyond question that neither the government nor the laborers referred to had the slightest claim upon the plaintiff, nor is it legally proved that, even subsequently, one cent of the money was paid to any person lawfully entitled to claim the same. The warrants put in evidence prove no such thing, and though it is true according to Mr. Fraser's evidence that he received from the Government, not \$40 000.00 but about \$23,000.00, which he handed over to others, asking them to pay the labourers, still that would not be sufficient evidence if the point were material, which I think it is not. It is a meritorious answer to this defence that the order itself, whatever otherwise its legal effect may have been, was handed to Mr. Hill, personally, to be substituted by another to the government only when the government would pass a minute of council guaranteeing that there would be no legislation affecting the interests of the plaintiff in respect to the bonds referred to and giving up the security bonds, and that the substituted order should be inoperative in case of such legislation. Admitting that the order could possibly have the effect of an assignment, as claimed for it, the point now under consideration is a question of fact, the decision of which the rule *nisi* throws upon us, instead of a jury. The plaintiff, Mr. Hill, and Mr. Boak are the witnesses upon whose evidence that decision depends. The plaintiff, on cross-examination, says: "Something was extorted from me,—a conditional promise to give the government certain bonds of the Halifax and Cape Breton Railway Co., to recoup them for paying

laborers defrauded by sub-contractors, on condition that the balance should be repaid; the whole conditional upon the event that there should be no legislation affecting these bonds till I should receive them." When recalled he says, in reference to the order, that he told Mr. Hill distinctly, that he made the order to him (Hill) personally and said: "When you return my security bond or put on record a minute of council protecting my rights under the provisions in the clause of settlement, as you promised me this morning, and give me a copy of it, I will substitute for this an order to the government and will then draw out a memo. of the conditions upon which it is given, namely, that upon the event of there being no legislation affecting the bonds until I receive them." Mr. Hill said "that will be all right but I have no time to wait now." Mr. Gregory further testifies that Mr. Hill then asked him to go to New Glasgow immediately and deliver the line up to Mr. Abbott which he did. But, before then, Mr. Gregory appears to have had so much reluctance to sign the agreement itself upon which he now sues, in consequence of some alterations, made in it in Montreal, after the terms were agreed upon in Halifax, that he went to New Glasgow without executing it, but Mr. Hill got him to come back to Halifax and told him that, if it was a matter of business, he would be perfectly justified in rejecting the paper, but that he must remember that a public work was stopped,—that he must not be too tenacious but trust to the government for protection. What does all this uncontradicted evidence mean? As Mr. Gregory testifies, he (Mr. Hill) said "that they had offered the best terms they could, and if I did not agree he could say from advices he had that morning from New Glasgow, there would be a rising there and my life would not be safe." Strong words these but not contradicted. Mr. Gregory said that, relying upon the promises of the government and that they would give him a copy of the minute of council, he would agree. The evidence is quite clear that the laborers were no creditors of Mr. Gregory and he did not owe them a cent, but that he had before then voluntarily paid out \$5,800.00 to relieve distress among them, caused by the fraud of sub-contractors. On the day that the paper which is called an assignment was given, Mr. Gregory had two interviews

with Mr. Hill at only one of which Mr. Boak was present. Mr. Hill proves that the plaintiff "was opposing fresh legislation affecting his bonds previously," and says "he continually appealed to the government to protect him." To protect him against what? Against anything which the company could do, independently of the government and the legislature? Not at all. The company alone were powerless to take away his rights; but the government, aided by the legislature were evidently considered sufficiently powerful for that purpose; and it is plain that it was against anticipated action, on their part, at the instance of the defendant company, that the plaintiff besought protection; in other words he besought the government to protect him against themselves and the legislature. It is impossible to misapprehend the meaning of Mr. Gregory's evidence, that the order put in proof was to deliver the bonds to Mr. Hill personally, not to the government, who were to have received another order only when the stipulated guarantee was given to the plaintiff. The government did not fulfil the condition upon which the plaintiff promised to give the order to them and it consequently was never given. It is useless to claim that, under the circumstances, a mere endorsement by Mr. Hill of an order deposited with him for a special purpose, and upon the condition in proof, could have given any right, as now claimed, to the government. Not one material fact testified by Mr. Gregory is contradicted by Mr. Hill, who was the person negotiating this singular transaction with the plaintiff; on the contrary, I regard his evidence, throughout, as corroborative of Mr. Gregory's. He says: "Mr. Gregory, for some reason of his own, wished the order to be in my name, just as it is there, without mentioning the Government." Just so. But what were the reasons, if not those given by Mr. Gregory, that another order would be made to the Government when the desired minute of Council was passed and the security bonds given up, and that, until then, the Government would have no claim upon the plaintiff. Mr. Hill says: "the Government, acting upon the report, (33 Appendix,) insisted upon getting something from Mr. Gregory to recoup the outlay." Had not the Government as much right to insist upon getting something from Sir Hugh Allan, if there *could* be any such

right, which there was not, unless an apprehension of future legislation to his prejudice would create an obligation on Gregory's part, and a corresponding right to the fund on the part of the Government. Mr. Hill says "the Government insisted upon getting something," &c.; but Mr. Gregory uses the more comprehensive and expressive term—"extorted;" and it is not necessary to decide which word is the most applicable, under the circumstances. It is enough that neither the one nor the other can be regarded, in this case, as a sufficient consideration, in view of the whole evidence, to support this claim of the Government against the plaintiff. Mr. Hill further states: "I thought and said that it was unfair that the character of his bonds should be changed or depreciated, but cannot say that I said so on that occasion. I think it probable that he himself imposed the condition, but do not recollect." "Mr. Boak and I, acting for the Government, assented to the agreement." What agreement? An agreement to take \$40,000 worth of bonds from Mr. Gregory for nothing! Or an agreement to take the bonds upon a condition now proved to have been unfulfilled by the Government! In either case the claim is valueless. Mr. Hill does not undertake to deny that Mr. Gregory gave the order under the condition which he states, but admits that it is probable such a condition was imposed by Gregory.

It matters not whether Mr. Hill did or did not express any words of assent to the condition imposed by Mr. Gregory, so long as he took the order subject to such condition. He might have refused to take it under the terms imposed, but did not do so. And any minute of Council subsequently passed by the Government, not in fulfilment of the condition upon which the order was given to Mr. Hill, cannot affect the plaintiff's rights in the most remote manner. But it is said that Mr. Boak contradicts the plaintiff's evidence, and that, therefore, the latter cannot succeed in this action. I cannot see where there is any material contradiction whatever. Mr. Gregory was sent for, by Mr. Hill, for the purpose of getting this promise from him. They had two interviews on the same day, at only one of which Mr. Boak was present, and he, (Mr. Hill,) says himself: "I gave the matter little attention since. My recollection is not clear unless refreshed by something

else,"—and that something was not produced. And assuming these three gentlemen to be equally credible, as witnesses, and that Mr. Boak had flatly, and without qualification, contradicted the evidence on behalf of the plaintiff, it would be still our duty to find this issue in favor of the latter, so unreasonable is the contention to the contrary. And if Mr. Boak's evidence were capable of the construction put upon it for the defence, and, in that sense, admitted to be true, it would not improve the defendant's case, because, then, it would be proof that there was no consideration whatever for the alleged assignment of the promised bonds, and, therefore, proof of the plaintiff's replication.

The plaintiff, in his replication, relies upon the fact that the so-called assignment was by parol, was without consideration, and that, before action, he revoked it and gave due notice thereof. It is not contended that this is no legal answer to the plea, the defendant being content to join issue on that replication, and the evidence appears to me quite satisfactory in support of it, so that a jury could not do otherwise than find that issue, also, in favor of the plaintiff. It is our duty to do the same. The verdict by consent was for \$80,000, with power, to the Court, to reduce or add to the amount. To reduce it we have not the power, consistently with the evidence; and the only remaining question is, how far we are obliged to add to it? Where, after the creditor has endeavored to obtain payment, there has been a wrongful withholding of a debt arising out of a contract which *does not* carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money; *Arnott v. Redfern*, 3 Bing., 353.

Where goods were sold to be paid by a bill, at a certain date, the price should bear interest from the time the bill would have been due, and may be recovered as damages on a count for non-delivery or non-payment of the bill; *Sluck v. Lowell*, 3 Taunt., 157.

If goods are sold to be paid for by a bill of exchange, in an action by the vendor against the purchaser for not giving a bill accordingly, interest will be allowed from the time the bill, if given, would have become due, whether the defendant

has or has not accepted the goods; *Boyce v. Warburton*, 2 Camp., 480.

Where a security carries interest and money is paid into Court after action is brought upon it with interest to the time of action only, a jury is bound to give a verdict for damages to the amount of interest between the date of action and payment into Court; *Kidd v. Walker*, 2 B. & Ad., 705. In *Arnott v. Redfern*, already cited, BEST, C. J., said: "If interest is to be given then, according to our own rule, it may be calculated *up to the time when the payment of the principal money may be enforced under judgment.*" This view is as reasonable as it is just, and is entirely applicable to this case. The agreement which is the foundation of this action speaks for itself and provides that the bonds should bear interest at six per cent. The exact time at which they could have been issued and delivered if the defendants had used every diligence for that purpose, as they undertook to do, is somewhat difficult to say and to that extent the plaintiff will perhaps be the loser. But that the defendants, by their own act, put themselves in a position of inability to deliver them at any time after the agreement with two Governments resulted in the legislation stipulated for in that agreement is certain; and I do not think that we would be administering law or justice if we did not add to the principal sum of \$80,000 the additional loss sustained by the plaintiff in consequence of the defendants' violation of their agreement with him, which loss we estimate at \$21,600.

Our judgment, therefore, is in favor of the plaintiff for \$101,600.

HALIFAX BANKING COMPANY v. WORRALL ET AL.

Before McDONALD, C. J., and McDONALD and WEATHERBE, J J.

(Decided July 4th, 1883.)

Non-suit.—Variance.—Record.

PLAINTIFF sued on a money bond. There was a variance between the declaration and the proof, the declaration setting out the words of the condition upon performance of which the bond was to become void instead of the obligatory part of the bond, and the plaintiff was nonsuited with a rule to set aside the nonsuit. On the first day of term plaintiff obtained a rule *nisi* for an amendment of the declaration and that a new trial be granted, because the Judge on the trial had improperly refused to grant the amendment. At the argument, plaintiff moved to discharge this rule with leave to move for another similar to it, but adding the words "on reading the minutes." The affidavit of plaintiff's counsel stated that the Judge had refused leave to insert, as one of the grounds in the rule, that the amendment had been refused. This was contradicted.

Held, that the rule *nisi* must be discharged as the Judge's minutes were conclusive as to what took place at the trial, and plaintiff had his remedy under the statute for the alleged refusal to grant a rule; that the plaintiff was properly non-suited on account of the variance, and that the non-suit could not be set aside for the alleged refusal of the Judge to grant the amendment, even assuming plaintiff's account of the matter to be correct.

The declaration also contained a count on an award in a prior suit on the same bond. The said suit was brought for the first instalment, but the arbitrators to whom the matter was referred by agreement awarded the whole amount of the bond to the plaintiff. The present action was for the third instalment. A record was made up in the first suit setting out the agreement and award, and was not filed until sometime after the bringing of this suit.

Held, that the record was inadmissible.

This was an action on a bond given to the plaintiffs by Mary Worrall, one of the defendants, prior to her marriage, then being Mary Black, for the purpose of guaranteeing the payment of the sum of twenty thousand dollars owing to the plaintiffs by their late teller, Martin Gay Black. The condition of the bond was for the payment of the said sum of twenty thousand dollars in four equal annual instalments of five thousand dollars each, and the action was to recover the third of such instalments, the first two having been paid.

Defendants pleaded that the bond in question was obtained by fraud and misrepresentation, and was wholly without consideration; also, for a defence on equitable grounds, that the said plaintiffs, when, etc., had in their employ as their teller, one Martin G. Black, and for a great many years the said Martin G. Black, while so in their employ, by and with the knowledge of the plaintiffs and their cashier, Samuel H. Black, and from time to time, misappropriated, embezzled and converted to his own use, large sums of money with which he had been and was entrusted by plaintiffs; that the

defendant, Mary Worrall, was then and when, etc., a shareholder in the plaintiffs' Company; that although the plaintiffs, their cashier and president knew and had knowledge that said Martin G. Black was dishonest, and as such teller was from time to time misappropriating and embezzling the funds of said plaintiff's Company and of the shareholders therein, yet they wrongfully and improperly, and contrary to their duty in that behalf, retained said Martin G. Black in their employ as such teller until his death, and by their connivance and wrong-doing in that behalf, permitted and enabled said Martin G. Black to embezzle and convert to his own use other large sums of money belonging to the plaintiff and to the shareholders of said Company, inclusive of defendant, Mary Worrall, which he could not have done had the plaintiffs, their president and cashier exercised due and proper care or any care and diligence in the discharge of their duties; that after the death of said Martin G. Black, the plaintiffs applied to the defendant, Mary Worrall, and falsely represented to her that said Martin G. Black had appropriated large sums of money belonging to the plaintiffs, without their knowledge or consent, and by means thereof and by reason and means of other false and fraudulent representations, not herein specified, they induced the defendant, Mary Worrall, to sign said bond, and defendant, Mary Worrall, did sign said bond, and, confiding in the plaintiffs' representations, that such embezzlement and misappropriation were and had been wholly unknown to them until the death of the said Martin G. Black; that plaintiffs' representations of their ignorance of said embezzlement and misappropriation was to the plaintiffs' knowledge wholly false, and was made with the intention of and for the purpose of inducing said defendant, Mary Worrall, to execute said bond, and so as thereby and by means of said bond to shield and protect the officers of said Bank from and against the liability which otherwise they would be under to said shareholders to pay and make good to the said shareholders the various sums of money which, through their indifference, neglect and want of good faith towards the members of said Company, they had suffered said Martin G. Black to embezzle; that said bond was not made or executed until long after the death of said Martin G. Black, and there

never was any consideration whatever for the making, executing, or payment of said bond by the defendant, Mary Worrall.

Plaintiffs also relied upon an agreement of the parties and their counsel, under which arbitrators were appointed to examine the books of the plaintiffs and their late teller, for the purpose of ascertaining the amount of deficiency, if any, in the teller's accounts, which the defendant, Mary Worrall, agreed to pay when ascertained, provided the amount did not exceed the amount of her bond. The arbitrators, having found that there was a deficiency of twenty-one thousand dollars and upwards, awarded that the defendant should pay the amount of her bond.

At the trial of the cause before WEATHERBE, J., the plaintiffs, at the suggestion of and in deference to the opinion of the learned Judge, became non-suit, with leave to move to set the non-suit aside, and a rule *nisi* was granted accordingly.

Graham, Q. C., in support of rule.—The learned Judge improperly declined to receive evidence of the conversation of a witness with Mary Worrall previous to the execution of the submission relative to the matter referred to. (MCDONALD, C. J.—Would that be ground to set aside a non-suit, if, even admitting that evidence, there would be nothing to sustain a verdict for you?) Certainly. If, when this essential piece of evidence was rejected, it would have been idle for us to proceed with any further evidence. We did proceed with this case but on another count. (WEATHERBE, J.—I do not see how I could admit evidence of conversation till the submission was proved.) Creighton should have been allowed to correct his statement in regard to this letter. (*Meagher, Q. C.*—There is no ground in the rule for that.) There is rejection of his evidence. (*Sedgewick, Q. C.*—It was not rejected.) (MCDONALD, C. J.—I don't see how he could have been allowed to be recalled after saying that he had never seen the woman after the submission, to say that he was appointed by her verbally.) The record was improperly rejected. It proved the dispute, submission and award in such a way that the parties were estopped from disputing it. The record is the best proof of the appointment. It settles

the submission and the award, and she has paid under it; *Duchess of Kingston's Case*, Smith's L. C. This is a judgment on an award. It is immaterial that the record is made up after action brought. The parties can make any admission after action brought; *Hart v. Troop*, 2 R. & G., 351. The judgment proves the appointment, because the appointment was essential to the judgment. Every step in the case is proved (without the record) except the appointment. The evidence of payment should have been admitted. The first count of the declaration is sufficient to sustain the action on the bond; 2 *Chitty on Pleadings*, p. 90. It sets out the obligatory part of the bond and breach of the condition. (*Sedgewick, Q. C.*—The bond declared on is not that put in evidence.) There is no variance. The obligatory part is complete down to the words "to be paid." The condition is that the \$20,000 is to be paid in three instalments. That may be declared on as the obligatory part of the bond set out; chap. 94, sec. 116; 2 *C. B.*, 380; 19 *U. C., C. P.*, 174; 7 *U. C., Q. B.*, 505; *Taylor's U. C. R.*, 473.

McCoy, Q. C.—The Court is bound to make the amendment we asked for, as it was refused at the trial, if the justice of the case demands it; 15 *C. B.*, 197. (*Sedgewick, Q. C.*—Counsel must say whether he moves for an amendment or not. He cannot make a hypothetical motion to amend. Besides, it is not in the rule.) It need not be in the rule; *L. R.*, 2 *C. P.*, 20. We can come here by a substantive motion for amendment; 9 *C. B.*, 375. In 2 *Oldright*, 77, an amendment was made at the argument; 24 *U. C., Q. B.*, 381. Under the Dominion Act of 1880, chap. 34, the Supreme Court of Canada, in *Caldwell v. Stadacona*, struck out the name of said Caldwell. In 1 *H. & N.*, 136, the party aggrieved by refusal of leave to amend should apply to the Court; 17 *U. C., Q. B.*, 226; 13 *M & W.*, 379. It would be monstrous if the Judge could refuse an amendment and then shut me out by refusing to put it in the rule. (McDONALD, C. J.—The remedy for that was in your own hands. You could have taken a rule under the statute.) We need not have it in the rule expressly; 7 *U. C., Q. B.*, 471. The Court will even amend at the argument to save the statute of limitations;

6 *Exch.*, 287; 9 *Exch.*, 762; 2 *C. & M.*, 420. The Court will even go so far as to amend an avowry after verdict; 4 *Bing.*, N. C., 286; 4 *M. & W.*, 343. As to the personal liability of Mrs. Black on the bond she was described as executrix, and was only liable as such; *Caldwell v. Stadacona Insurance Company*, 2. R. & G., 300. (McDONALD, J.—That was an appeal from a Judge at Chambers.) But it shows what the affidavit should contain. If the first count was good the bond contained all that was necessary and should have gone to the jury; *Saunders on Pleading*, 651. This was not a bond payable on a penalty. It was a money bond for a sum payable by instalments. It is set out substantially.

Sedgewick, Q. C., contra.—There is not the slightest evidence to go to a jury and no verdict for plaintiffs could be sustained. In regard to the record, the money was paid, the debt satisfied and the whole claim abandoned long before the record was filed. The object with which this paper was tendered was not stated. The paper was filed long after the action was commenced. The chief objection, however, is that it is not and does not purport to be the record of any judgment of a Court. There was an agreement between the parties to refer the suit to arbitration and an award made by virtue of the agreement. There never was an order of Court, and no judgment can be entered on an agreement until it is made a rule of Court. The record is put in to show the appointment of an arbitrator to estop us. (McDONALD, C. J.—Mr. Graham argued to show that it was not sought to use it as an estoppel, but as evidence of admission.) There can be no admissions of that sort; *Taylor on Evidence*, 687, 688. (WEATHERBE, J.—If we receive it Mrs. Black can never deny that she appointed the arbitrator, even if, in fact, she never appointed him.) If the record is a record of pleadings what right had they to put in the bond. Is that a record of the Court? It is not the bond described in the declaration. The bond in reference to which the award is made is not a bond for a sum payable in instalments; it is a bond by which Mrs. Black becomes absolutely bound to pay \$20,000 on a certain date. The record should be signed by the officer of the court. In *Murdoch v. Grant*, Thompson's Reps., 100, the

record was handed to the officer in court, who marked it filed. A judgment is only conclusive as to the issues in the cause and not as to a decision in a particular way. Even an admission in pleading is not evidence in another suit between the same parties. If an action had been brought upon the bond previously, or was pending, no subsequent action could be brought; *Chitty on Pleadings*, vol. 2, p. 87. The verdict cannot be set aside here on the ground that the Judge refused the amendment. It is not in the rule. The sole question is whether the Judge improperly rejected evidence. There is no evidence that Worrall was ever appointed by the bank as the arbitrator of the bank. The bond here is not correctly described. No one, in looking at the declaration here, could say that the bond described in the declaration is the one proved here. It is capable of argument that the bond declared on and that proved, are two entirely different things; there is a hopeless variance between them.

Meagher, Q. C.—The question as to amendment is not in the grounds and has not been reserved. The practice here is different from England, where the Court is moved for the rule. Here the Judge grants the rule. The power is given here to the Judge, and the rule was taken on two grounds, viz., rejection of evidence and because the non-suit was reserved, and that was the sole reason on which the Court dealt with the matter. They could not otherwise have dealt with it. The Court would not make an amendment here. The Court has not before it the materials that the Judge had at the trial. Mr. Sedgewick was heard on affidavit, and that affidavit is not here. (WEATHERBE, J.—The case is not reported here on the subject of amendment at all. If the question as to amendment had been in the rule, I would have reported what took place about it.) The statute here is not at all similar to the English statute. Our act refers wholly to amendments made at the trial. The word "such" in the second section, as to amendment, refers to the kind of amendment to be granted under the first section, and that refers to amendments made on the trial; otherwise, the provisions about new trial would be meaningless. It is only for granting an amendment under these sections that a new trial will be

granted, and not for refusal. Under the last section the Judge can direct the jury to find according to the merits, without making an amendment. (McDONALD, J.—Then the party would be liable to two actions.) Not so, the finding is to be entered on the issue roll for the purpose of estoppel. The English statute is entirely different from ours. See *Day's C. P. A.*, 215. It was re-enacted in 1854; *Day's C. P. A.*, 342, 378. The only words added are “if duly applied for;” *Harrison's C. P. A.*, sections 307, 321. Every Judge has the same power under this statute as the Court. If Mr. McCoy's contention is correct he could have gone to any Judge at Chambers, after the non-suit, and obtained his rule. (McDONALD, C. J.—The difficulty is that he is out of Court.) On the subject of amendment cites *28 E. L. & E.*, 162. The propriety of the amendment is left to the discretion of the Judge. What was asked was to add a plea pleading an agreement, which was proved, and would have been a defence. In *14 C. B.*, 473, it was held that the Court will not interfere with the discretion of the Judge at *nisi prius* as to the amendment of the record. In *16 C. B., N. S.*, 823, the plea sought to be added was a plea of negligence. The Judge refused to allow it to be added, and the Court upheld his ruling.

Ritchie, Q. C., in reply.—Cites *Revised Statutes*, Series, p. 371, sections 48, 50, 51. Under the rule we are entitled to the amendment, if we are entitled on other grounds. If the Judge should have made the amendment under the statute and refused, the non-suit was “against law;” *14 C. B., N. S.*, 374. The agreement is not technically or formally a bond and can be declared on without setting up a condition. The act in reference to bonds does not apply. It is no more than an agreement to pay a sum by instalments. There is no penalty. The record is good. It really amounts to a plea of confession. It is a judgment between the same parties on the same bond and the record should have been received.

McDONALD, J., (July 14th, 1884,) delivered judgment as follows:—

The action was brought upon a money bond for \$20,000, conditioned for the payment of that sum by instalments of

\$5,000 each, the third being that which is now sought to be recovered. At the trial, when the bond was put in evidence, it was found that there was a variance between the declaration and the proof, and the plaintiff was non-suited, but with a rule *nisi* to set the non-suit aside, upon the ground that it was against law and evidence, and for the improper rejection of evidence. Afterwards, by consent of counsel, in open court, another rule *nisi* was substituted to set aside the non-suit upon the same grounds, with power to the Court to enter a verdict or judgment for the plaintiff in such sum as they should think proper, in case the Court should be of opinion that the plaintiff was entitled to recover. And on the 12th day of December, being the first day of the term, Mr. MacCoy moved, on affidavit, for a rule *nisi*, which was granted in these words:—

On hearing read the affidavit of William F. MacCoy, the plaintiffs' attorney herein, sworn to on the 4th December, instant, and the exhibits thereto annexed, it is ordered that the plaintiffs have leave to amend their declaration by adding the counts contained in exhibit C, annexed to said affidavit; said amendment being necessary for the purpose of determining in this suit the real question in controversy between the parties, and that a new trial be granted herein, because the Judge, on the trial of this cause, improperly refused to allow such amendment, unless cause to the contrary be shown before this court on Saturday, the twenty-third day of December, instant, or so soon thereafter as the court shall be at leisure to hear the same.

Halifax, 12th December, A. D. 1882.

By the Court,

(Sgd.) S. H. HOLMES,

Prothy.

On motion of Mr. Ritchie, Q. C. of counsel with plaintiffs.

At the argument Mr. MacCoy moved that this rule be discharged, with leave to move for another rule *nisi* adding: "on reading the minutes of trial;" and, as I think it more convenient, I shall first deal with this branch of the case, and endeavor to decide to what extent, if at all, the Court should grant rules of this kind, based on affidavits, when the minutes

of trial, taken by the presiding Judge, are available. In this case, the effect of the amended rule, if made absolute, would be to combine the minutes and the affidavits, as the basis of the plaintiff's application to set aside the non-suit. Mr. McCoy, in his affidavit, states that at the trial he asked leave to insert, as one of the grounds taken in the rule *nisi*,—that the learned Judge refused to allow an amendment of the declaration; but his affidavit is not consistent with those of Mr. Sedgewick and of Mr. Meagher, and it is an attempted contradiction of the learned Judge's minutes. But I really cannot see how the question, whether or not the Judge refused a rule on the grounds mentioned, can affect the present enquiry; because, assuming Mr. McCoy's affidavit to be perfectly correct, and that the learned Judge refused to grant a rule *nisi*, as the affidavit discloses, his remedy was clear and simple; namely, to give the security in such cases required by the statute, and take his rule thereunder. It appears to me that the course pursued in this case, on the part of the plaintiff, is entirely without authority; and, if adopted as our practice, that it would lead to a most undesirable state of things, very prejudicial to the proper administration of justice. It is virtually asking us to ignore the notes of the Judge who presides at the trial, whenever counsel or an attorney may think fit to state, in an affidavit, his impressions of what may have taken place at the trial. No judge will refuse to correct his minutes, if applied to for that purpose, and satisfied that they are incorrect. But this is not an application of that kind, and I cannot find any precedent for the present application, successfully made, in any court administering British law. On the contrary, we find in *Everett v. Youells*, 4 B. & Ad., 683, that, although affidavits of jurymen may be admissible to show what questions they put to the judge, in open court, and may be used to supply the defects of notes taken by counsel, they cannot prevail against the judge's own statement. And in *Rex v. Grant*, 5 B. & Ad., 1081, it was held that neither the notes of a shorthand writer, nor the statements of another gentleman, verified by affidavit, were receivable;—TAUNTON, J., saying: "If such affidavits were now received it would be the first instance of such a practice, and would produce the greatest injury to the administration

of justice." See also *Archbold's Practice*, 12th ed., 1538, where it is said, "the judge's notes are conclusive as to the evidence, etc., and the Court will not allow them to be contradicted, even upon affidavit; nor can an affidavit be used to supply alleged omissions of evidence in the judge's notes." It will be seen that, in *Rex v. Grant*, just cited, the question was, not whether or not the evidence was correctly taken, but, like this, whether or not the judge's report of what took place in open court, at the trial, should be preferred to the statements contained in affidavits on either side. I think that the rule *nisi* taken under Mr. McCoy's affidavit, and the application to amend it, must be discharged, but as defendant's counsel has consented to this, it will be without costs.

The next question is whether or not the rule *nisi* for a new trial can be made absolute under the facts of the case, as we have them in the report of the learned Judge who tried the cause. When the bond was put in evidence it was discovered that there was a variance between it and the statement in the declaration; inasmuch as the words of the condition, on the performance of which the bond was to have become void, appeared by the declaration to have been relied upon as the cause of action, instead of the obligatory part of the bond; and I am of opinion that the objection was well taken. If, under the first count in this declaration, without any amendment, a verdict had passed and a judgment had been entered in favor of the plaintiff, and if another action were brought by him to recover the same amount, which, in point of fact, is the cause of action in the present suit, the declaration in the latter suit, setting out the bond and condition correctly, I do not think that a record of the judgment in the first suit would operate, as it should, and no doubt would, if the pleadings were correct, as an estoppel in the second. In that case the two actions would not appear, from the record, to be for the same cause; *Outram v. Moorehead*, 3 East, 346. The agreement set out in the declaration in this cause, might have existed and have been enforced as well as the bond put in evidence; but for that simple reason the plaintiff company cannot recover. The plaintiff company did not prove the contract declared upon, and, without an amendment of the pleading, (to which I shall presently refer,) the non-suit was

right, so far as the issues raised under the first count came in question. But there is a count in the declaration upon an award made, as it is alleged, in a prior suit brought to recover the first instalment mentioned in the condition of the bond; and, in that first suit the declaration is the same as in this one, excepting that it is for the first instalment, and this one is for the third; and with the additional difference that the first was against Mary Worrall, then Mary Black, now the wife of the other defendant, Worrall. Although the suit purported to have been brought to recover \$5,000, an agreement,—not a rule of reference,—was signed by the parties, intending to give power to the arbitrators to investigate and award upon, not only the subject matter of that suit, which was only one instalment of the bond, but the full amount, (\$20,000,) of the obligation. The arbitrators awarded that Mrs. Black, the then defendant, should pay to the plaintiff company the full sum of \$20,000, under the terms and conditions of the bond and agreement. If that suit had been brought, as I think it should have been, under the English practice as regulated in that country by Parliament before the 1st William 4th; and if, in that case, the appointment of arbitrators had been under the usual rule of reference, they would have power to investigate and award upon the whole amount of the bond, and the record would have been good evidence in a second suit brought in the right way upon the bond between the same parties. The learned counsel engaged in the cause seem to have seen the difficulty, as they referred matters in dispute, not by a rule of court, but by an agreement signed by themselves, the president of the plaintiff company and the then defendant, Mrs. Black, which agreement, however, was never made a rule of court. So that the plaintiff company, in attempting to use a record in that suit as evidence in this one, encounter the difficulty that, under the pleadings in the first, the amount now sought to be recovered did not, at all, come in question; and that the power of the arbitrators to investigate or award, as they did, depended entirely upon an agreement, outside of the issues raised by the pleadings, which agreement, without being made a rule of court, ought not to appear upon the record at all. Whether or not the submission could, under the peculiar

facts of the case, have been made a rule of court, it is enough to say that it never was so made, so as to justify its being embraced in the record. That which is called a record was filed on the 15th day of November, 1882, over three months after this action was commenced. It is not very much like a record roll, in the proper sense of the term ; but, on its face, bears evidence that it was intended to subserve the purposes of this suit ; else why should we find in it a copy of the bond upon which the plaintiff company brought this suit, contrary to all precedents and to the practice of the Court ? As well might the attorney recapitulate, in the record roll, any other part of the evidence, as this bond, and attempt to estop the defendant from setting up the truth. In point of fact, however, the setting out of the bond does not appear to help the plaintiff's case, because on its face it shows that it is not the agreement declared upon. I cannot see that this so-called record could help the plaintiff's case if received, and if the decision of this Court, as long ago as 1842, *Thompson's Reps.*, 100, is good law, then the record ought to have been, as it was, rejected. In that case, as in this, the record was not filed till after action, and, although there was no direct issue of *nul tiel* record on the pleadings, still it was held that the record was properly rejected, the same as if that had been the issue tried. In *Reid v. Smith*, N. S. Decisions 1866-67, leave was refused to file a record *nunc pro tunc*, that it might be used as evidence between the sons of the original parties. In *Chesley Adm., etc. of Ritchie v. Bonnett*, 1 R. & C., 112, on a plea of *nul tiel record*, it was held that the plaintiff could not recover, as he only filed a record five days before the trial and after plea. And in *Jost v. The Churchwardens, &c.*, 1 R. & G., 451, there was no question of the record being filed in time. As a matter of fact, it was filed before action. The other papers tendered, and which were mere fragments of what the record should be, were properly rejected because the record is the only proper evidence of the matters in issue and of the final judgment in the first cause.

But it is contended that the nonsuit ought to be set aside because the Judge refused to amend the declaration, and on that point the plaintiff Company again meet with a serious difficulty ; namely, that that ground is not taken in the rule

nisi to set the nonsuit aside. I am far from being prepared to say that, even if that difficulty had not stood in the way, the refusal to amend would have been a sufficient ground to set aside the nonsuit. Without questioning the discretionary power, given by our statute, to make amendments, (*Revised Statutes*, ch. 94, sec. 192,) and, fully recognising the right which that statute gives to the party *against whom* an amendment may be made, to apply for a new trial on that ground, it is proper to remark that the statute is silent as to the *right* of the party applying for such amendment to get a rule on the ground that such amendment was refused. And, further, in *Ritchie v. VanGelder*, 9 E. R., 762, it was held that the English Act, which in this respect is the same as ours, does not render it imperative on the Court to allow a plea to be substituted after issue joined, even although the application be made prior to the trial, supported by an affidavit that the real question in controversy between the parties could only be raised on the record by the introduction of the proposed plea. In support of that motion the defendant contended that he was entitled as of right to the rule as prayed, because the act expressly states that all amendments necessary for determining the real questions in controversy "shall be made." But the rule was refused. The evidence of Mr. Forrest was at first properly rejected. If received at that stage the effect would have been to hold the defendants liable for the acts of the witness, without showing any authority, whatever, to perform these acts. But, in point of fact, the evidence was afterwards received, as soon as the counsel for the defendant withdrew the preliminary objection taken on the ground that no agency was proved.

The rule *nisi* to set aside the nonsuit must be discharged with costs.

SEAMAN v. PORTER.

The following dissenting opinion delivered by Mr. Justice RIGBY having been accidentally omitted from its proper place (ante p. 292) is inserted here.

I think that to enable the guardian to maintain this action in his own name, the statute should have expressly authorized it so to be brought, or have vested the property in the debt in him. If this view is correct then the defendant would be liable, after judgment against him in this suit, to another action at the suit of the lunatic to recover the same debt and could not plead the former judgment in bar. The defendant was therefore bound to object that this action would not lie. I agree with my brother THOMPSON that the proceedings can be amended and should go back for such purpose, but I think, under the circumstances, the costs consequent upon such amendment and those of this appeal should be paid by plaintiff. The plaintiff should have asked for the amendment in the Court below, and, the objection below having been well taken and the plaintiff having insisted that the action would lie in its present form, I do not think that the defendant should have his costs of the appeal imposed upon him.

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1883, TO APRIL 1884.

RE EST. W. MCKILLIGAN.

Before McDONALD, C.J., and McDONALD, RIGBY and THOMPSON, J.J.

(Decided December 15th, 1883.)

Appeal from Probate Court.—Costs where appellant partly successful.

APPEAL from the Judge of Probate having been dismissed, costs were withheld because the Judge had improperly condemned the party who appealed in costs as to the contestation below. *In re Simpson*, 3 R. & C. 357, and *In re Heffernan*, 3 R. & C. 386, distinguished.

Appeal from a decree of the Judge of Probate for the County of Hants. The decree appealed from granted administration of the estate of W. McKilligan to Margaret Preeper, one of the next of kin of the deceased, as supported by three-fifths of the interest. Administration of the estate was also claimed by Duncan McKilligan, a brother of the deceased, whose claim was unsupported. The learned Judge found that the claims of the brother and sister to administration, so far as character and capacity were concerned, were pretty evenly balanced, and his decision in favor of the sister was determined by the fact that her claim was supported by three-fifths of the interest, while that of the brother was unsupported.

The decree ordered that the costs of the contestation, including the Court fees, be paid by Duncan McKilligan.

Pearson in support of appeal.—The clause of the statute in relation to the order of appointment is *Revised Statutes*, chap. 90, sec. 11 and 12. The Judge selected Hugh McLean to be associated with Margaret Preeper, to the exclusion of Duncan McKilligan one of the next of kin, whom he admits to be a proper person. The discretion of the Judge must be reasonable. The majority of interest must be subject to the interest of the estate. The Judge could not entertain the application of Margaret Preeper without her husband's consent. The fact that the Judge had to select some one who was not one of the next of kin to act in concert with Mrs. Preeper was a reason why Duncan should be appointed. (McDONALD, C.J.—The Judge gives the strongest reason for her appointment. Duncan was hostile in interest to all but himself. The Judge has a wide discretion and it must be shown that it was exercised to the prejudice of the estate. RIGBY, J.—It does not follow that a partner is the most suitable person to appoint. It may be just the other way.) The Judge has merely considered the majority of interest. The parties were not equally suitable when one was conversant with all the business of the deceased and the other not. This is the first thing to be considered. The appointment of an administrator according to the wishes of the majority of interest is a secondary consideration. A sole administration is always preferred to a joint. A son is always preferred to a daughter; *Wms. on Ex.*, 493. The Judge erred in giving costs of the contestation against Duncan McKilligan.

Ritchie, Q. C., was called on upon the question of costs.—The Judge was right. He is to give costs in any matter contested before him against the party against whom his decision is made. The case of *In re Est. Heffernan*, 3 R. & C., 486, decides that the Judge's decision as to costs is not ground for appeal. If it comes up at all it should come up in a summary way pursuant to the act before a Judge at Chambers.

THOMPSON, J. (December 15th, 1883,) delivered the judgment of the Court:

The Court was of opinion, at the argument, that the appeal could not prevail, as to the merits of the appellant's conten-

tion, but doubted whether the decree appealed from should stand as regards its condemning the appellant to bear the costs of the contestation in the Probate Court. I think that each of the parties to the contestation below should bear his own costs up to the time of the decree, and that the Court fees should be borne by the estate, and that such may be the order without impugning the decisions in *re Simpson* and in *re Heffernan*, 3 R. & C., 357 and 486. Our authority to modify the decree as to costs does not appear to be taken away by the fact that the appeal from the decision as to costs might have been confined to that point alone and taken in a more summary way. Each party to the appeal must bear his own costs. The appellant cannot obtain costs because he has appealed from the whole decree and failed as to the merits of his case. The appellees cannot obtain them because they sought to enforce against the appellant the costs below, which I think he should not bear.

MARTER v. PRYOR.

Before McDONALD, C. J., and McDONALD, SMITH, and RIGBY, J J.

(Decided December 15th, 1885.)

Vagrancy Act.—Fine and imprisonment in alternative.

PLAINTIFF was charged before the Stipendiary Magistrate for the City of Halifax with lewd conduct and keeping a room or house for prostitution, and was fined \$50, and, in event of non-payment, ordered to be imprisoned two months. There was evidence that the magistrate ordered him into custody, where he remained till the fine was paid, but this was not put to the jury.

Held, by McDONALD, C. J., and McDONALD, J., that the magistrate was not liable to an action for false imprisonment.

By RIGBY and SMITH, J J., that the conviction in the alternative was bad, and the imprisonment thereunder unlawful.

This was an action brought by plaintiff against defendant, who was Stipendiary Magistrate for the City of Halifax, for having, on the 1st day of December, A. D. 1881, assaulted and beaten the plaintiff and given him in charge and custody of a police officer, and caused him to be imprisoned in the police station at Halifax, whereby he suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and prevented from carrying on his business, &c.



The defendant, for a first plea, denied the alleged trespasses.

And for a second plea said that before and at the time of the alleged trespasses the defendant was Stipendiary Magistrate and one of Her Majesty's Justices of the Peace in and for the City of Halifax, and the plaintiff having been brought before him as such Magistrate at the Police Office in Halifax charged with lewd conduct and making his office in the City of Halifax a place of prostitution, said charge was duly heard and enquired into by the defendant as such Magistrate, who had full jurisdiction in the premises; and defendant in the execution of his duty as such Magistrate, having heard the evidence adduced, convicted the plaintiff of said charge, and sentenced him to pay a fine of fifty dollars or to be imprisoned for sixty days, which are the alleged trespasses.

And for a third plea to said declaration defendant said that at the time of the alleged trespasses and grievances he was a Justice of the Peace, and that the trespasses and grievances alleged to have been committed by him were acts done in the execution of his office as such Justice with respect to a matter or matters within his jurisdiction.

Plaintiff replied joining issue, and for a second replication to the second plea of the defendant said that the charge alleged to have been made against the said plaintiff was one over which the said defendant as such Stipendiary Magistrate as aforesaid had no jurisdiction, and the sentence imposed by the said defendant was one which no law in force within the Dominion of Canada enabled the said defendant to impose; and that after the making of the alleged conviction in said plea set out, the said conviction and the record thereof were removed by writ of *certiorari* into the Supreme Court of Nova Scotia, where a rule *nisi* afterwards issued to quash and set aside the said conviction and the record thereof, which said rule *nisi* was subsequently made absolute by and before the said Court upon the 21st day of April, A. D. 1882, by means whereof the said conviction and the record thereof together with all proceedings thereunder were quashed and set aside, whereby the said conviction and the record thereof became absolutely null and of no effect or force whatever

and at the time of the pleading of the said plea were null and void, and are now of no force or effect.

And for a third replication, and for a replication to defendant's third plea plaintiff said that the trespasses and grievances done by the defendant were not acts done in the execution of his office as such Justice of the Peace nor with respect to matters within his jurisdiction, but were acts done by said defendant in pursuance of a conviction made by him in a matter wherein he had no jurisdiction, and wherein he had exceeded his jurisdiction; and the said conviction and the record thereof being afterwards removed by writ of *certiorari* into the Supreme Court of Nova Scotia, said Court granted a rule *nisi* upon the 11th day of February, A. D. 1882, to quash said conviction and the record thereof; and afterwards, upon the 21st day of April, A. D. 1882, the said Supreme Court made absolute the said rule *nisi*, &c., &c.

The plaintiff was arrested at his office or place of business, at the instance of his wife, and conveyed to the police station, where he was placed in confinement, and an entry to the following effect was made in a book kept for the purpose of recording charges:—

“Charles W. Marter and Cecilia Seymour in the lockup, given in charge by Mrs. Charles W. Marter, for lewd conduct, brought to the station at 7 o'clock, p. m., by Detective Hutt and Assistant Deputy Marshall; also charged with keeping a room or house for prostitution.”

The following morning plaintiff was brought before the Stipendiary Magistrate and charged with lewd conduct and making his office a place for prostitution, to which he pleaded not guilty. After hearing the evidence of the officers by whom the arrest was made, and of Mrs. Marter, the prisoners were each fined \$50, or to serve two months in the City Prison, and were then again placed in confinement. The conviction was quashed on *certiorari* and this action, for false imprisonment, was tried at Halifax in November, 1882, before McDONALD, C. J., with a jury. The learned Chief Justice charged the jury as follows:—

After commenting upon some remarks that had been made by counsel on both sides with reference to the parties to the cause, I stated to the jury that so far as appeared in evidence there was nothing that reflected in the slightest degree upon

the character or judicial integrity of Mr. Pryor; I then referred to the protection thrown around judges by the law of the land while in the discharge of their judicial functions, and remarked that this protection extended not only to judges of the higher courts, but to those of inferior courts, justices of the peace and jurors, and for the sound reason that the minds of men engaged in the exercise of judicial functions should be untrammelled by the fear of prosecution by those whom their judgments or verdicts might affect or offend, and that while these duties were honestly performed within the legal jurisdiction of the parties exercising these functions, the law afforded them absolute protection.

I instructed the jury that the question as to amount of damages, if damages were awarded, rested entirely with them, and proceeded to state to them what I conceived to be the law by which they were to be governed. The defendant was the Stipendiary Magistrate of Halifax on the morning of the 1st of December last. On entering the Police Court in the usual daily routine of duty he found the plaintiff, Marter, with the woman, Seymour, arraigned before him on a charge preferred against them of "lewd conduct and of keeping a house of prostitution." This charge was entered in the charge book kept for that purpose by the police, and was taken up by the Magistrate in the usual routine. The plaintiff and Seymour were not arrested by the direction or under the warrant of the defendant, but were brought in during the night by the police. I instructed the jury that the charge preferred against the plaintiff and on which he was tried and sentenced was one within the jurisdiction of the defendant as Stipendiary Magistrate of Halifax; that the plaintiff being arraigned before him as such Magistrate, he had jurisdiction of the body as well as the cause; that the Magistrate was obliged, by virtue of his office, to try and adjudicate upon the offence thus charged before him, upon the plaintiff also within his jurisdiction, and to adjudicate upon the same, and that he was not liable to any legal suit in consequence of such adjudication. I distinctly instructed the jury that it was their duty to take the law from the Court, and that upon the law, as laid down by me, it was their duty to find for the defendant. I told them they must exclude from their consideration whatever

was said or proved as to the guilt or innocence of the plaintiff on the charge tried before the Magistrate, as the latter was not responsible for misapprehension or mistake as to the law or facts on the trial of a cause over which he had by law the right to exercise jurisdiction.

It was very strongly pressed upon the jury by the counsel for the plaintiff that there was not sufficient, or no evidence to justify the judgment which the defendant had exercised, and I told the jury that had I tried the cause on the evidence which appeared on the record produced, I might and probably would have arrived at a different conclusion, but I instructed them, as I had before done, that the merits or demerits of the trial or judgment, if honestly arrived at in a cause within the defendant's jurisdiction did not affect the defendant's liability in this action.

Mr. Harrington put in evidence the record of the proceedings in the Court below and when the paper was read he desired that only that portion of the paper setting forth the charge and conviction should be read. The record also contained the evidence given in the Court below, and this I directed to be read as part of the paper put in evidence by the plaintiff's counsel, but told the jury that, for the reasons before given, they should not allow that evidence to influence their judgment in the slightest degree in the consideration of the case. I observed, however, in relation to the plaintiff, that in my opinion it required a very considerable degree of assurance on the part of a man admittedly standing in the position of this plaintiff with relation to his wife and the young woman Seymour to come into this Court seeking damages in the case, even if the plaintiff were legally liable, which, as I had already instructed the jury, was not the case.

The jury found a verdict for the defendant, to set aside which a rule was granted on the grounds, 1st, that the verdict was against law and evidence, and 2nd, for misdirection.

Russell, in support of rule.—The charge on which the plaintiff was arraigned and to which he pleaded was of lewd conduct and making his office a place of prostitution. In the police book the charge was "keeping a room or house for prostitution." It is necessary to enquire as to the character

of the charge to determine the jurisdiction of the magistrate. The Act under which the magistrate proceeded was that respecting vagrants, Acts of 1869, pp. 260, 261; the penalties provided by which are those which the magistrate actually inflicted. Assuming that the magistrate had jurisdiction and that the plaintiff was properly convicted of the offence charged, the magistrate could only pursue one of three courses. He could fine, or imprison, or both fine and imprison, but he must make up his mind which course he will pursue. The sentence here was neither of the three allowed, and was, therefore, in excess of jurisdiction. The magistrate did not make up his mind that plaintiff should be both fined and imprisoned. His decision was that he should be fined *or* imprisoned; *Barton v. Bricknell*, 13 Q. B., 393. If the magistrate had power to fine, but not to collect the fine by imprisonment, the imprisonment was illegal; *Queen v. Clew*, 46 L. T., N. S., 482. The magistrate having determined to fine, had the means of enforcing payment by distress, without resorting to imprisonment; *Summary Convictions Act*, Acts of 1869, chap. 31, sec. 57. Using imprisonment instead of distress as a means of enforcing payment of the fine was in excess of the jurisdiction of the magistrate. Imprisonment can be used, but only in the absence of the distress. By 11 and 12 Victoria the magistrate was given power to detain the party pending the return of the distress. Prior to that he had no such authority. The conviction was also illegal and excessive in requiring the plaintiff to give bonds to keep the peace. Nothing appears that would entitle the magistrate to attach that to the conviction, such as it is. As to power of justices to require bonds to keep the peace; *4 P. & D.*, 405. *Leary v. Patrick*, 15 Q. B., 266, shows that where the magistrate has jurisdiction to commence the proceedings, yet, if he exceeds his jurisdiction in the course of the proceedings, he is liable. (McDONALD, J.—Your difficulty is to show by legal evidence that he did exceed his jurisdiction.) The magistrate has not shown that he had any jurisdiction even to begin the proceedings. There must be something in the charge and finding to bring the matter within the magistrate's jurisdiction. There is nothing from beginning to end of the proceedings to show that an offence was committed within the magistrate's territorial jurisdiction;

Weeks v. Clutterbuck, 2 Bing., 483 ; 1 Q. B., 421. Assuming the charge on which the plaintiff was tried was within the territorial jurisdiction of the magistrate, (i. e., lewd conduct and making his office a place of prostitution,) it was no offence within the Dominion Act.

Henry, Q. C., contra.—It is not necessary that the charge should be so framed as to negative an act consistent with innocence. The cases in 15 Q. B., and 4 P. & D., appear to establish that where a magistrate exceeds his original jurisdiction, the second section of the act applies. The important question then is whether the act of the magistrate was in excess. I contend that here the magistrate did not exceed his jurisdiction. Our act is different as to the scope of the power of the magistrate from that on which *Barton v. Bricknell*, 13 Q. B., was decided. That act enabled the magistrate to punish in either of two alternative manners, but only on certain conditions. Here the provision is different. The magistrate has, in the first place, an option as to which punishment he will inflict, and in the second place may inflict both. The punishment as inflicted was reasonable even from the prisoner's standpoint, because it gave him an alternative which he would not otherwise have. The case cited from *1 Strange* was decided long before the statute, and has no applicability.

Harrington, Q. C., in reply.—The plaintiff may recover without proof of malice. If the punishment is fine, the mode of collection is controlled by the Summary Convictions Act and not by the discretion of the magistrate. In this case it must be conceded that the object of the imprisonment was to compel payment of the fine. The alternative punishment is not for the plaintiff's benefit, as the Summary Convictions Act provides for a distress to collect the fine.

The COURT, (December 15th, 1883,) delivered judgment.

MCDONALD, J.—The defendant was Stipendiary Magistrate in Halifax, and, on the morning of the 1st of December, 1881, when he entered the police court to discharge his judicial functions, he found a charge made against the plaintiff and a woman, both then in custody, "for lewd conduct," and "also

for keeping a room or house for prostitution." This charge was entered in the defendant's absence, according to the practice in the police court, and it was the duty of the magistrate, under the Statute of Canada, 1869, chapter 28, and under section 131, Laws and Ordinances of the City, to enquire into the case. Having jurisdiction in that class of cases, a misapprehension of facts cannot render him liable in an action of this kind. *Taylor*, in his work on evidence, section 1483, referring to the celebrated case of *Brittain v. Kinnaird*, quotes approvingly from RICHARDSON, J., who said:—"Whether the vessel in question was a boat or not, was a fact on which the magistrate was to decide, and *the fallacy is in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction*. If a fact decided, as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction." Again at section 1484, *Taylor* says:—"Many other cases might be cited in support of the general proposition that where, (supposing the facts alleged to be true,) a magistrate or other judicial personage has jurisdiction, his jurisdiction and consequent immunity from an action cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them." He cites ample authorities to sustain this view. No conviction or warrant was made out or signed by the defendant in this case, but the City Clerk made a memo. of his decision in these words, "prisoners each fined \$50 or serve two months in the city prison each, Mr. Marter to give security to keep the peace for twelve months, bond hereunto annexed." After remaining in custody during part of the day, paying the money and giving security, the plaintiff was discharged, without being brought to the city prison in pursuance of the memo. made by the City Clerk. His imprisonment commenced on the previous evening, without the knowledge or interference of the defendant, and continued until after the trial; and as it was not in obedience to any command or direction of the defendant, he, the defendant, cannot be made liable even if he had no jurisdiction in the case, which I think he had. And, even if the memo. made by the Clerk could not be called a conviction, which it cannot, I

cannot regard it in the light of such a command or direction by the magistrate as would render him liable, though it were acted upon by any one without a warrant of commitment. Without such warrant the constable had no authority; with it he was protected. A mere conviction by a magistrate, even if erroneous and without jurisdiction, is not evidence of imprisonment, such as here declared upon. The plaintiff practically was left in the custody in which the magistrate found him; and, although I think that an action would lie against the magistrate for maliciously refusing to discharge him from custody, if that could be proved, such is not this case. The declaration is for assaulting and beating the defendant, and giving him in charge and custody of a police officer, and causing him to be imprisoned in the police station at Halifax; but no malice is alleged or proved. There is not sufficient evidence to support this. The memo. made by the Clerk is no evidence of it, but entirely the contrary; because, if it was a command or direction at all to any officer, (which it was not,) it would only be to imprison the party in the city prison, which was not done, or alleged in the declaration to have been done. The plaintiff, it is true, swears that the defendant directed Sullivan (the constable) to take him to the police station, but the evidence leaves no room to doubt that he was taken to that place and there imprisoned before the defendant knew anything about the case, and continued in custody of the police officer till the magistrate's decision was reduced to writing by the Clerk, showing the very reverse of what the plaintiff says. Improbable as this evidence of the plaintiff appears, it might be fairly contended that it was a question for a jury if, at the trial, the direction for non-suit had been entertained, and if a rule were taken to set that non-suit aside, but that was not the case, the plaintiff having chosen to take the jury's opinion, which opinion was that they did not believe him. The case now stands as if no non-suit had been directed, that direction not having been acted upon, but the facts having been left to the jury, and I confess that I cannot see how an honest jury could do otherwise than as they did. In addition to the Clerk's evidence, speaking from a memo. made at the time, the woman who was charged as participator in

the offence in question, testifies that the defendant directed the plaintiff to be taken, not to the place of imprisonment mentioned in the declaration, but to the place in which the law authorizes imprisonment in cases of that kind, that is the city prison. The case cited for the plaintiff, *Wicks v. Clutterbuck*, 2 Bing., 483, is not at all in point, because there the conviction was right but the warrant of commitment, which in this case does not exist, was defective and did not follow the conviction. There the commitment was the foundation of the action, which could not be maintained upon the conviction. Here there is neither warrant nor conviction, nor any evidence of a direction or command on the part of the defendant to do the act complained of unless the jury were wrong in disbelieving the plaintiff's evidence, as opposed to that of the City Clerk and of the woman who was charged as participator in the same offence for which he was arrested. For these reasons I think that, even if it be conceded that the defendant had no jurisdiction, or that he had exceeded it, the declaration is not supported by the evidence. He did not personally imprison the plaintiff and the evidence disproves the charge that he caused the imprisonment mentioned in the declaration in any other way. To render him liable it is not sufficient that the proceedings were set aside, nor that the decision was against the weight of evidence, or even against the whole evidence, while he acted in good faith and without malice, whilst having, as I hold that he had, jurisdiction in the class of cases then under his adjudication.

I think that His Lordship the Chief Justice correctly charged the jury, who found a correct verdict; and that the rule *nisi* must be discharged with costs.

RIGBY, J.—If the only issue to be tried in this case was that raised by the plea denying the alleged trespasses, I think there was evidence enough to justify a verdict for the plaintiff, notwithstanding that the imprisonment complained of in the declaration is confined to that in "the police station at Halifax," although from the testimony of the plaintiff I infer that the imprisonment in the "police cells" was his principal grievance. Plaintiff himself swears that defendant directed Sullivan to take him down to the police station, and Cecilia

Seymour, in her examination, states that on the first of December she was imprisoned in the police station, and that Marter was also imprisoned there; that after the examination Marter went back to the cell where he was imprisoned. He was taken down there by Sullivan. She goes on to say; "It was after the fines were imposed that the policeman removed Dr. Marter. I saw Dr. Marter afterwards passing through the cell that I was in, a policeman was with him; I think the court was held about eleven o'clock in the morning; I was taken down to the cell about the same time as Dr. Marter; Hutt took me down; we were taken together; they unlocked two doors, the door I went in and the door Dr. Marter went in. We went into the station room first; we were not left there; they unlocked a door leading from the station into a room with cells off it; they took Dr. Marter in, etc." This issue was not, however, put to the jury by the learned Chief Justice, who, being of opinion that defendant's justification had been established, instructed them to find for him. And the question now to be determined is whether such ruling can be upheld. The defendant was proved to have been, at the time of the alleged trespass, the Stipendiary Magistrate of Halifax. The plaintiff was arrested by a police officer and taken to the police office on the last night of November, and brought before the defendant for the first time upon the following morning, when the latter, after hearing testimony, fined the plaintiff fifty dollars, or to serve two months in the city prison, and to give security to keep the peace for twelve months.

Thomas Rhind, the City Clerk, was examined on behalf of the plaintiff at the trial of this cause, and stated that when a party was arrested by the police the officer entered the charge on which he made the arrest in a book in the police station, down stairs, and that in the morning the City Marshall copied those charges into a book in the police office, from which the magistrate read the charge on the arraignment or trial.

The Assistant City Clerk having also been examined on behalf of plaintiff, stated that he usually copied down the charge as read by the Stipendiary from the police book; he

says, "I take it down as nearly correct as I can, as long as I can get the gist of it."

The record put in by defendant contains an extract from the book kept by the police in the station, referred to in the foregoing evidence of Rhind, from which it would appear that part of the charge for which Marter had been arrested was for "keeping a house of prostitution," and which must have been a part of the charge upon which he was arraigned before the magistrate, though the Assistant Clerk, in taking down the charge as then read by the former, incorrectly states that part of it as a charge of "making his office a place of prostitution." It seems to me that the charge for which Marter was thus arrested and tried, undoubtedly comes within the following words of section 1, chapter 28, Dominion Acts of 1869:—"All keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes," over whom, by that enactment, the Stipendiary Magistrate has jurisdiction to punish by imprisonment in any place of confinement, for a term not exceeding six months, (as amended by chapter 43 of the Acts of 1874,) or by a fine not exceeding fifty dollars, or both. I consider, therefore, that it was necessary for the plaintiff to allege in his declaration in pursuance of the requirements of section 1, chapter 111 of our *Revised Statutes*, that the act complained of was done maliciously and without reasonable or probable cause, unless this is a case "where he has exceeded his jurisdiction," and falling within section 2 of that act. Plaintiff's counsel contends that defendant had only power to fine Marter or to imprison him, or to both fine and imprison him; and that, having imposed the fine of fifty dollars, his jurisdiction was exhausted, and the alternative imprisonment was an excess. This contention is fully borne out by the case of *Regina v. Clew*, reported at p. 482 of 46 Law Times Reports, in which the defendant had been convicted under section 3 of the Licensing Act of 1872, (35 & 36 Victoria, chapter 94,) of selling intoxicating liquor without a license, and adjudged to pay a fine and costs, "and in default to be imprisoned for one month with hard labor." GROVE, J., in giving judgment upon a rule for a *habeas corpus* says:—"By section 3 of the Licensing Act of 1872, a person selling intoxicating liquors without a license 'shall be liable to a

penalty not exceeding fifty pounds, or to imprisonment with or without hard labor, for a term not exceeding one month.' The words of the section are clear and impose an alternative punishment, either fine or imprisonment; but it does not say that in default of payment of the fine imprisonment may be inflicted. And it clearly does not mean this; because if the legislature had intended it, it would have provided it as it has done in several acts, where it is specifically said that imprisonment may be given in default of payment of a fine." It remains now, therefore, to consider whether the imprisonment in the case at bar was such an excess as was contemplated by section 2 of our Act for the Protection of Justices. One of the first cases decided upon secs. 1 and 2 of chap. 44 of 11 & 12 Victoria, from which our statute on the same subject has been taken, was *Barton v. Bricknell*, 13 Q. B., 393. In that case defendant, a Justice of the Peace, convicted plaintiff under statute 29 Charles II, chap. 7, sec. 1, in five shillings penalty and eleven shillings costs, to be levied by distress; and the conviction directed that in case of non-payment of the several sums, and if there should not be a sufficient distress, plaintiff should be set publicly in the stocks for two hours, unless the penalty and costs were sooner paid. Plaintiff's goods were distrained; but the conviction was afterwards quashed, on account of the illegal alternative as to confinement in the stocks, and an action of trespass was brought for the distress." On the trial of this cause a verdict was entered for the plaintiff, with leave to enter a verdict for the defendant if the Court should be of opinion that he was entitled to the protection of 11 & 12 Victoria, chapter 44, and on giving judgment upon the motion so to enter the verdict, COLERIDGE, J., said:—"Now it cannot be doubted that the justice had jurisdiction in everything except the alternative order, and the action is brought not for putting the plaintiff in the stocks, under it, but for doing that which the defendant might have justified, if he had drawn up his conviction in proper form. Then we have Statute 11 and 12 Victoria, chapter 44, section 1, which relates to actions 'brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice.' I think words

can hardly be found more accurately to describe the act, which the defendant has done, and for which this action was brought. But section 2 raises a question whether the words in section 1 are to have full effect given to them, so as to protect the defendant." Then, after quoting section 2 he proceeds:—"I am not prepared to deny that the present case falls within the literal meaning of these words, for this is an act done under a conviction in a matter in which the defendant has exceeded his jurisdiction. But if we give these words their full literal meaning they contradict the first section. We cannot then try to construe them so as to give effect to the whole of the act; and I think we do this if we confine section 2 to cases in which the act by which the plaintiff is injured is an excess of jurisdiction; for instance, if the plaintiff in the present case had been put in the stocks under the illegal alternative, and the action had been brought for that; in which case probably trespass might have lain." Now, in the case at Bar, the defendant having decided to punish the prisoner by a fine, he should have been set at liberty and the fine collected by distress, etc., as provided by the statute relating to Summary Convictions; the subsequent direction as to the alternative imprisonment was illegal, and there was evidence that it was acted upon, and for such illegal imprisonment this action was brought. It cannot be said that the fine of fifty dollars having been fixed as the limit of his punishment, the subsequent imprisonment could be justified by any conviction that could be drawn up, or was something which the act under which the defendant was "proceeding could by any possibility justify," which was the test laid down by JERVIS, C. J., in *Ratt v. Parkinson*, 20 L. J., M. C., 212, (Chitty's Coll. of Statutes, Vol. 2, p. 989,) of these cases falling within section 2, and I think, therefore, this action was correctly brought and it was unnecessary for plaintiff to bring himself within section 1. *Leary v. Patrick*, 15 Q. B., 266, is also an authority to show that an action for false imprisonment under section 2 will lie against justices in a case where they have jurisdiction to adjudicate, as the conviction recited they had; when, in fact, no such adjudication had been made. It may be said that the imprisonment was justified under that part of the adjudication which

required that Marter should give bonds to keep the peace, but it seems to me that any imprisonment in consequence of that direction would be equally without justification. No breach of the peace had been charged or, as far as has been shown, in any way suggested. I know of no Canadian or local law authorizing a detention until such security should be given under such circumstances, and the case of *Haylock v. Sparke*, 1 El. & Bl., 471, is an authority that no such power existed at common law, and that if it should be exercised in such a case, an action for the imprisonment would lie under sec. 2 of the statute.

I think the rule *nisi* should be made absolute with costs.

SMITH, J.—This was an action of false imprisonment brought by plaintiff against the defendant, Stipendiary Magistrate for the City of Halifax. The defence was a denial of the alleged trespass. I am of opinion that the defendant had jurisdiction in the class of cases adjudicated upon by him, and out of which this action arose, and therefore it is for this Court to decide whether, upon the facts and law in the case, the verdict given for the plaintiff herein can be sustained on the charge of the learned Chief Justice, who tried it. The correctness of the charge, as it appears to me, depends entirely on the construction to be put upon section 1 of chapter 28 of the Dominion Statutes of 1869, *i. e.*, whether the defendant had power to fine, and in default of payment to imprison. Having carefully read the section above referred to, I think no such existed, for the words which alone could confer this power, are not to be found. The case of *Regina v. Clew*, cited by my brother RIGBY in his judgment, would seem conclusively to settle the question; unless the section under consideration could be construed differently from the English Act, which the Court in that case was dealing with. Undoubtedly, the defendant could have punished the plaintiff if the evidence sustained the charge against him, by imprisonment, or by a fine, or by both; but these words certainly do not confer the power on a magistrate to fine and in default of payment, to inflict another punishment. It might ingeniously be urged that the latter words of the section, “such fine and imprisonment being in the discretion of the convicting magis-

trate," enlarge the punishment beyond the previously expressed words, and give a discretionary power to go beyond them, I cannot so construe the language. I apprehend such discretionary power as being referable to the respective punishments previously imposed, and as giving no authority to enlarge or alter them. I think, therefore, the imprisonment was illegal, and the action sustainable against the defendant, provided the act was done by him, or by his direction. I think there is evidence, whatever its character, that the defendant was removed from the court to the police station at the instance of defendant, which, however inconsistent with the woman's statement, would raise an important issue, as I think, and one which should have been passed upon by the jury. The learned Chief Justice, holding the opinion he did, that the defendant was justified in imprisoning plaintiff in the manner alleged, would deem it unnecessary, of course, to submit this question to the jury; but, holding the view I do of the law, I cannot but think it should have been so submitted, if relied on as a defence. It is unnecessary for me to say now how far I would have concurred with my brother McDONALD's views with regard to the imprisonment having been made or ordered by the defendant, had the jury found in favor of the defendant on this point. I think, concurring as I do with the judgment of my brother RIGBY, the rule must be made absolute with costs.

McDONALD, C. J.—I have looked into the authorities as carefully as I could, and retain the opinion still that the conduct of the magistrate was in entire harmony with his duty. In my opinion Mr. Pryor is a Judge of a Court of Record, and having a right to all the protection which the law throws around persons occupying that position. There would be little difficulty in justifying his conduct on that ground, but I think it is justifiable independently of that view. I think that he was acting within his jurisdiction, and that the case relied on by my brothers RIGBY and SMITH, do not apply. At the trial I directed the jury to find a verdict based on my view of the law, and abstained from submitting to them any question of fact. If I erred in that there should be a new trial. Under the English statute the penalties were not

cumulative but alternative, and the magistrate must do one of two things; but we are not dealing with a statute like that, but with one entirely different and embodying an intention of a different character. If we are to give a meaning to the words used by our Legislature, what can they mean but to give the most complete power to fine or imprison, or both. Having that power, what did Mr. Pryor do? He said in effect, I will both fine and imprison you, but if you pay the fine I will remit the imprisonment. For these reasons I think the English cases do not apply, and that the rule must be discharged.

STEPHEN ET AL. v. GAVAZA ET AL.

Before McDONALD, C. J., and SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided December 15th, 1885.)

Insolvency.—Composition and Discharge.—Notes for Composition.—Principal and Surety.—Promissory notes, making, delivery, and consideration.—Finding of County Court Judge on Facts.

J. V. GAVAZA was in partnership with three other Gavazas previous to 26th February, 1877, when he retired, and the others continued the business as T. A. Gavaza & Sons. On retiring he was to receive \$2,000, for \$1,750 of which he took the note of the new firm. Shortly afterwards all four were put into insolvency on debts of the old firm. J. V. Gavaza, although one of the insolvents, proved as a creditor on the note for \$1,750, and acted as a creditor in all the insolvency proceedings. The insolvents, on the 14th November, 1877, offered a compromise of 50 cents on the dollar, payable in 6, 12, and 18 months, and to be secured by the joint and several notes of the insolvents, and of Susan Marshall and T. W. Chesley. The offer was accepted and a deed of composition was made and confirmed. By the deed the four insolvents covenanted to pay the composition and to secure it by such notes, and the creditors released their claims and authorized the assignee to return the estate to the insolvents. The deed was dated 30th November, 1877. On 28th December, 1877, the four Gavazas joined in a request to the assignee to convey the estate to T. W. Chesley "to hold the same in trust, to convert the same into money to meet the claims of our creditors on promissory notes signed by Mr. Chesley as our surety." In an action on one of the composition notes, made for part of the dividend on the claim of J. V. Gavaza for \$1,750, signed by the other three Gavazas and by Susan Marshall and Thomas W. Chesley, payable to the order of J. V. Gavaza, and by him indorsed to the plaintiffs after maturity.

Held, McDONALD, C. J. dissenting, that J. V. Gavaza being one of the insolvents, was not one of the creditors covenanted with, and therefore was not entitled to composition notes under the deed.

That although he might have had a right to rank in respect of the \$1,750 against the separate estates of his co-insolvents, he had relinquished such right by consenting to the transfer of the assets to Chesley.

That the notes to be signed by Marshall and Chesley were notes to the creditors of all the insolvents, and not notes from three of them to the other, and that Marshall and Chesley were only indemnified as to the former.

That J. V. Gavaza was not one of the creditors who released their claims by the deed.

That consequently there was no consideration for the note sued on, as to Marshall and Chesley.

That inasmuch as the note sued on had been delivered only to the assignee to satisfy a mistaken notion entertained by him, that he was entitled to demand such notes, and with express instructions that he should not part with it, there was no delivery by the makers as a contract.

Held, also, that the weight of evidence established the defence that the claim of J. V. Gavaza for his dividend had been satisfied by another note in which one Bonnett joined as surety.

Judgment of County Court reversed and judgment entered for defendants.

This was an action on a promissory note drawn by Norman A. Gavaza, S. Millidge Gavaza, John M. Gavaza, Susan Marshall, and Thomas W. Chesley, payable to the order of James V. Gavaza, and by him endorsed to the plaintiffs. The defendants, Norman A. Gavaza, S. Millidge Gavaza, John M. Gavaza, and Susan Marshall, (the latter appearing severally,) appeared by attorney and pleaded denying the making and presentment of the note, and alleging want of consideration, payment, and that the note was fraudulently obtained and endorsed by the original payee, and also on equitable grounds, as follows:—

And for a sixth plea, and for a defence upon equitable grounds, the defendants say that they, as part of said partners of the late firm of T. A. Gavaza & Sons, were with the said firm, placed in insolvency, in 1877, under the Insolvent Act of 1875 and amending Acts, and James V. Gavaza, the original payee of the promissory note sued on in this action was, at the same time, placed in insolvency as one of the members of said firm of T. A. Gavaza & Sons. That on or about the twentieth day of November, A. D. 1877, the creditors of the said firm agreed with the insolvents to execute a deed of composition on the terms that they should receive a dividend on their respective claims of fifty cents on the dollar, in three certain instalments of six, twelve, and eighteen months, said dividends to be secured by promissory notes to be made by the insolvents and other responsible joint makers. The said defendants and said James V. Gavaza thereupon prepared to effect a strict compliance with the terms of said composition, and applied to Thomas W. Chesley, one of above defendants, to sign the composition notes aforesaid as their security. Whereupon said Mr. Chesley consented upon certain terms to become surety as aforesaid for the due payment of said composition notes, one of which terms was that he would become

NOTE.—See the decisions in the case of *Chesley v. Gavaza*, *infra*.

surety only on certain promissory notes which were to be made to strangers out of the family of said insolvents and certain other persons, and expressly objected and refused to become surety on any claims of said James V. Gavaza, whereupon said James V. Gavaza, with certain others of the alleged creditors of said insolvent firm, made and signed the following memorandum of agreement:—

ANNAPOLIS, November 30th, 1877.

R. J. UNIACKE, ESQ, Assignee in Insolvency :

In relation to the offer of the insolvents, T. A. Gavaza & Sons, to procure adequate security for amount of composition in favor of the creditors by obtaining the signatures of Miss Susan Marshall and T. W. Chesley, Esq., to the compromise notes in favor of creditors. This letter is to inform you that in relation to our individual claims against said estate, we do not require you to procure the signatures of Miss Susan Marshall and Mr. Chesley to the notes in favor of us individually, as we shall be quite satisfied with the security of Messrs. Gavaza themselves only to said notes.

(Sgd.) J. V. GAVAZA, and others.

That said recited memorandum of agreement was forthwith placed in the hands of Mr. Uniacke aforesaid, but there after at the special request of Mr. Uniacke, and with the full knowledge of said James V. Gavaza, he well knowing the facts aforesaid, the defendants were requested to obtain the signatures of said Marshall and Chesley to said notes only formally, and for the sole and only purpose of enabling Mr. Uniacke, as said James V. Gavaza well knew, to certify that the terms of the composition deed had been complied with by the insolvents and to enable him to convey the estate of said insolvents to said Thomas W. Chesley, as trustee thereof, and simultaneously with aforesaid proceeding and before the execution of the composition deed by said James V. Gavaza, the full amount of his claim was settled and adjusted between him and defendants by a new promissory note which is now in litigation in another suit brought by said James A. Gavaza against defendants and Peter Bonnett, Esquire, to secure the amount thereof. And defendants allege furthermore that the note sued upon in this action remained in the hands of Mr.

Uniacke as custodian thereof, and was not to be delivered to James V. Gavaza, and said James V. Gavaza fraudulently and collusively, without the knowledge or consent of the defendants, obtained possession of the same on or about the twenty-fourth day of August next before the commencement of the suit, and fraudulently endorsed the same to the plaintiffs long after the maturity of the same, and plaintiffs received the same without due and proper caution and enquiry of the fraudulent acts and purposes of said James V. Gavaza.

The defendant, Thomas W. Chesley, appeared in person and pleaded to the same effect. The cause was tried before SAVARY, County Court Judge at Annapolis, who gave judgment for plaintiffs, from which an appeal was taken to the Supreme Court. The cause was argued March 22nd, 1882, before a division Court composed of McDONALD, C. J., and JAMES and RIGBY, J., who affirmed the decision of the County Court Judge. JAMES, J., dissenting. In consequence of the division of opinion at the first argument, the cause was re-argued February 20th, 1883, before the full Court. The material portions of the evidence are set out in the judgment of the Court.

Harrington, Q. C., in support of rule.—Mr. Chesley did not sign the notes with the intention of making promissory notes in favor of James V. Gavaza, but with the intention of satisfying the scruples of the assignee. It is competent to a person who signs a note to show that it was not intended to operate as a note. The note here was never made or delivered as a note, and there was no consideration for it. The judgment below did not proceed on any question of fact. (THOMPSON, J.—I think the Judge had to find the question of fact before he found the question of law. You may succeed on either.) He does find for the plaintiff in regard to the \$450 note which was a separate matter of defence. In reference to the letter from J. V. Gavaza, the Judge accepts Mr. Chesley's evidence as to how the notes were signed, but holds that it was no defence. As to power of Court of Appeal to review findings on questions of facts cites *Murphy v. Romo*, 2 R. & G., 175; citing *L. R. 2*, Scotch Appeals, 53. (THOMPSON, J., refers to *Jones v. Huff*, L. R. 5, Exch. Div., 122.) In *Chesley v. Gavaza* the offset is not in the same right. (SMITH, J.—Is that ground

in your rule.) No. (RIGBY, J.—That does not make so much difference, as that the point was not taken below.) The note was admissable as evidence; besides the defect appears on the record; *L. R.* 4 Q. B. Div., 500. (RIGBY, J.—My difficulty arises from a case in relation to appeals from the County Courts in England. It was held that where there is an appeal on a point of law, the point must have been raised below. The reason is that if raised below it might have decided the case.) There is a difference between the statutes. Your Lordships are asked to decide in the very teeth of the statute in relation to set off. We should be allowed to amend. The law is in our favor and there are no merits against us. (THOMPSON, J.—The right of the Court of Appeal to review disputed questions of fact was discussed and affirmed in *L. R.*, 2 Prob. Div., 287, and in *L. R.*, 4 Ch. Div., 28.) Cites generally, 10 *Moo.*, P. C. Reps., 108; 6 *El. & Bl.*, 370; 11 *C. B.*, N. S., 369, 374; *L. R.*, 5 Q. B., 475; *Byles on Bills*, 100, 101; 12 *Q. B.*, 317; 8 *M. & W.*, 496.

Longley, contra.—When the firm of Gavaza & Sons was dissolved in February, 1877, by the retirement of James V. Gavaza, the latter received as his share of the assets of the firm, a note for \$1,750, and it was agreed to pay him \$250 in cash. The firm was continued under the same name and failed in October following. James V. Gavaza had a right, when he went out of the firm, to take with him \$2,000 in cash. Because he forbore to do this, is there any reason why he should be placed in a different position from any other creditor. (THOMPSON, J.—He has no right to receive a dollar until all the other creditors are paid in full.) He filed a claim unobjected to by the other creditors and he signed the deed of composition without objection. (WEATHERBE, J.—He was an insolvent himself and liable for every dollar.) Not if he was a creditor. He was bound for the liabilities of the old firm. (WEATHERBE, J.—The time is past for contesting. McDONALD, C. J.—He admitted his liability for debts contracted subsequently to the time of the dissolution.) Mr. Chesley recognized James V. Gavaza's right to rank. The estate was handed over to Mr. Chesley for the purpose of carrying out the composition and discharge. The \$250 note was given in

consideration of the \$250 cash which was to have been paid James V. Gavaza by the old firm, and not in extinction of the note for \$1,750. The agreement of the insolvents, with their creditors, including J. V. Gavaza, was to give the creditors notes endorsed by Mr. Chesley and S. Marshall. The assignee had to certify the amount of claims, the number of creditors, etc., in which J. V. Gavaza's claim was included. J. V. Gavaza and others authorized the assignee, in regard to their individual claims, to dispense with Mr. Chesley's endorsement. This might have justified Mr. Chesley in refusing to endorse the notes; but, having placed his name on the notes, and having delivered the notes, can he escape the legal liability which attaches to his action? Mr. Chesley's name having been placed on the notes, though the parties to whom they were to be delivered, might have sued any one of the makers individually, they could not have omitted Mr. Chesley and sued the others. The note was, therefore, not such a note as James V. Gavaza was entitled to. (THOMPSON, J.—Uniacke seems to have been under a misapprehension. He thought he had to see that the creditors got the notes, but the creditors discharged the insolvents over his head. He never would have allowed the notes endorsed by Mr. Chesley to go out of his hands if it had not been for that misapprehension.) He felt bound to see that all the terms of the deed of composition were fulfilled before he certified it. Whoever asked Chesley to sign the note, he having done so, it was the same as if he had done so at the instance of James V. Gavaza. The authority of the party receiving the note is not a vital point. He was competent to receive them, but had no right to hold them. All the notes were given to the assignee, who held them in cases of contested claims until the contest was decided. Mr. Chesley was bound by the circumstances under which he delivered the note. The only condition was that he was to produce notes from the Gavazas. (THOMPSON, J.—Or a release from James V. Gavaza. WEATHERBE, J.—Within what time were the notes to be given?) Within a reasonable time, which should be left to the Judge below. (THOMPSON, J.—The composition deed shows that Chesley was to sign as much as surety for James V. Gavaza as for the others. James V. Gavaza got his discharge in insolvency by virtue of a claim

which he filed against himself, and can he now say that he and his brothers have got their discharge by virtue of a fraud, but that Mr. Chesley must pay because he did not object?) I admit the power of the Court to review facts, but unless there are strong reasons the Court will not do so where the Court below is competent. (WEATHERBE, J.—There are circumstances which require explanation; the whole conduct of J. V. Gavaza, his giving a note the other way, when all he had to do was to give credit, and his asking for time. THOMPSON, J.—I might add the testimony of Mr. Chesley as to the admission by Gavaza, which Gavaza does not deny.) The schedule given on the application of J. V. Gavaza to swear out of jail is no estoppel here. (THOMPSON, J.—He swore that there were no debts due him.) The notes were not in his possession, and he did not know whether he was to receive the substituted notes or not. (WEATHERBE, J.—Five days before going to jail he gave Chesley a note for \$60. McDONALD, C. J.—When he swore out he swore that he was indebted to Chesley in a hundred dollars.) His claim against Chesley was undetermined at that time. An amendment, if granted, cannot affect the case of Stevens and Gavaza. The amendment cannot be made because it is not covered by any plea below, because the ground was not taken below.

T. Chesley, in reply.—Uniacke, the assignee, was altogether wrong in regard to his responsibility. The utmost that can be inferred from my conversations with him, is that I would speak to the Gavazas on the subject.

THOMPSON, J., (December 15th, 1883,) delivered the judgment of the Court:—

Plaintiffs, doing business as A. Stephen & Son, sue Norman, Milledge and John Gavaza, Susan Marshall and T. W. Chesley, on a joint and several promissory note, dated 30th November, 1877, for \$307, payable to James V. Gavaza, and by him endorsed to them. As the endorsement was made after the maturity of the note, the defences which existed as against the payee are set up, and the case depends on these defences. The chief of these are: want of consideration and denial of the making. The following are the facts relied on for the consideration and as proof of the making of the contract. The three

Gavaza defendants were in partnership with the payee, James V. Gavaza, down to 26th February, 1877, on which day the latter retired from the firm, the business being continued by the three others, under the old name of T. A. Gavaza & Sons. These three agreed to give the retiring partner \$2,000, of which amount \$1,750 was secured by a note of the new firm. Early in the fall of the same year a writ of attachment was issued against all four, and they were put into insolvency by reason of unpaid liabilities of the old firm. J. V. Gavaza, although himself one of the insolvents, proved as a creditor for the note of \$1,750 and interest, and assumed the position of a creditor throughout. His affidavit said: "The insolvents are indebted to me," etc.; he appointed an attorney to act for him at meetings of creditors, and this attorney voted on the claim. All the insolvency proceedings went in the name of "T. A. Gavaza & Sons," (which was the old firm's name as well as the new.) On November 14th, 1877, the insolvents, under the name of T. A. Gavaza & Sons, made an offer of compromise "of the liabilities of said insolvent's estates" of 50 cents on the dollar, payable in six, twelve and eighteen months, and "to be secured by the joint and several notes of the above-named insolvents," and of Susan Marshall and T. W. Chesley. The offer was accepted, and by deed of 30th November, 1877, between the four Gavaza's, (as the insolvents,) of the first part, and the "creditors of the said insolvents of the second part," the four Gavaza's covenanted to pay the composition at the time specified, and in the meantime to secure the same as stated, and the creditors released and discharged the four Gavaza's from the debts, and authorized the assignee to return their estate and effects to them. This deed was confirmed by the Judge. On 28th December, 1877, the four Gavaza's joined in a written request to the assignee to convey the estate to T. W. Chesley, who, as stated therein, would hold the same in trust "for the purpose of converting said estate into money to meet the claims of our creditors on promissory notes signed by Mr. Chesley as our surety," etc. It is alleged that the note sued on was one of the composition notes which defendants made for the benefit of James V. Gavaza, as one of the creditors, under his claim for \$1,750 and interest, and that the composition to which he was entitled

was a sufficient consideration. This contention is met by defendants in several ways:—They declare that James V. Gavaza was not entitled to any composition note, for several reasons, which will hereafter be mentioned and dealt with. Why then was such a note given? This is answered by a set of facts which are not in dispute. The assignee was under the erroneous impression that there was a duty incumbent on him of seeing the composition secured to the creditors, although the deed is a direct discharge from the creditors to the insolvents, and does not contain any reference to the assignee, excepting for the purpose of directing him to give up the estate. He says: "I demanded the notes and got them. I insisted on your (Chesley's) name being there." To satisfy these well-meaning but uncalled for scruples, not only were the joint and several notes of the four Gavaza's and of Marshall and Chesley placed in his hands, but also notes signed by the three defendant Gavaza's and the same sureties in favor of James V. Gavaza, for fifty cents on the dollar of his claim. The assignee, and indeed all the other parties to the transaction, seem to have been under the impression that the insolvent, James V. Gavaza, had the same right as any other creditor; the assignee therefore required, as he explains in the passage above quoted from his evidence, the note for James V. Gavaza and afterwards gave his certificate to the Judge, computing the debt to him as part of the amount of the assenting claims which made up the proportion required to give validity to the deed. The defendants say that whether, under the terms of the composition, and under the law, James V. Gavaza could share in the composition or not, it had been clearly understood from the first that he was not to have the security of Marshall and Chesley, and they shew that they procured and delivered to the assignee, a letter dated 30th November, 1877, in which James V. Gavaza and certain other persons, (creditors), dispensed with the signatures of Marshall and of Chesley, and declared that they would be "quite satisfied with the security of the Messrs Gavazas themselves only to said notes." Notwithstanding this, the assignee persevered in demanding that Marshall and Chesley should sign, and they did sign, but Chesley warned Uniacke that he should not give those notes up to any one; they were willing to

respect his scruples, which required that he should be able to say that he had such notes, but not willing that he should make anybody liable by letting the notes go out of his hands. This answers the question "why were the notes given?" But another immediately arises: these being the admitted facts, why did Uniacke deliver up these notes, (including the note sued on,) as he did, some time after they fell due? The answer is that he continued, in spite of all remonstrance, to act under the same delusion as before, and to fancy that he was bound to see all the creditors satisfied. He says he told Chesley that he would not give them up "if James V. Gavaza would release him from responsibility in respect to the composition deed." Such responsibility did not exist, for the reasons already mentioned, and for others which will come up hereafter. Uniacke goes on to say: "James V. Gavaza gave me a notice that as I did not get the firm's note he would not be held any longer to his agreement * * you, (Chesley,) always told me not to give them up to anybody. * * If the terms of the other agreement were carried out, and James V. Gavaza had released me from any responsibility on the composition deed, Chesley's signature would have been a mere form."

Having thus ascertained the reason why the note in this suit was made, and why it eventually found its way into the possession of the payee, it remains to be seen what defences in relation to the consideration and the delivery arise. The debt due to James V. Gavaza, by his fellow insolvents, and the circumstances attending the composition, did not call for the making of any such note. This Gavaza had, doubtless, contingent rights against the estate, they were not, however, the same in kind or rank as the rights of the creditors of the four insolvents. If other creditors had been paid in full, his claim would then have ranked against the estate of his brothers, and as against their separate estates he had probably the right to rank equally with, possibly to precede, the other creditors; he could not, however, vote or rank with the general creditors of the four; he could not avail himself of covenants or agreements made by the insolvents, of whom he was one, with the general creditors, unless his right to do so was conferred by express and special words See *Bump on Insol-*

vency, 650, 656, 657, 660, and *Story on Partnership*, sec. 405, et seq. He lost his remedies, whatever they were, against his fellow insolvents and their estates, by agreeing to the transfer of all the assets to Chesley. These general principles become plainly applicable to this case when we examine closely the transaction. James V. Gavaza did not, under the offer of compromise, acquire a right to receive a composition on his claim, (even though that claim was regularly filed with the assignee and not contested by him or by the creditors, but recognized by them as a claim on which the insolvent could vote and rank,) because he was one of the parties making the offer, not one of the parties to whom that offer was made; because, further, the claims on which composition was thereby offered were "liabilities of said insolvents' estate," meaning, evidently, liabilities of all four;—and because, moreover, the composition notes were, under that offer, to be signed by himself along with the others, and he could not be maker and payee in the same instrument, any more than he could be held to have made this offer to himself and afterwards accepted it on behalf of himself. On this point the authority to transfer the assets to Chesley becomes evidence also, (laying legal rules of construction aside,) of what the parties themselves intended, for it states that the estate is to be turned into money "to meet the claims of *our* creditors, on promissory notes signed by Mr. Chesley as *our* surety." James V. Gavaza signed this, and evidenced thereby what kind of notes it was that Marshall and Chesley were to sign;—Chesley was to be surety for him and his brothers, not to him,—the estate was to be turned into money to pay the notes on which Chesley was *his* surety as well as that of the other insolvents, and it was only in respect of such notes that Chesley was secured. Nor did the deed of composition give James V. Gavaza any claim to a composition note, with or without security. He was a party of the *first part*, along with the other insolvents, covenanting with "the several persons, firms and corporations who were creditors of the said insolvents," and who were parties of the second part. The deed draws the line of demarcation plainly, and puts this person out of the category of those who were covenanted with in relation to the composition. Whether a creditor of the estate or not,

he certainly was not one of those who were treated with by that deed as creditors. It follows equally that he never released his claim by that deed, and this circumstance alone would shew that there was no consideration for any composition note, with or without security, and would be sufficient to defeat his right, or the right of his endorsee, after maturity, to recover on such a note, even if it had been regularly delivered to him. So far from ever having, by giving up anything, put himself in a position, legally or morally, to get such a note as that sued on, he profitted largely by the whole transaction. He obtained his discharge from insolvency while keeping intact his original claim against his fellow insolvents, and having come out in that respect better than the other creditors, he prefers to take fifty cents on the dollar of his claim from Marshall and Chesley, rather than look to the estate which only shewed a prospect of yielding twenty cents to the dollar; and rather than resort to the remedies which he had preserved to himself on his original demand against his fellow insolvents. Then there is the express agreement, sworn to by several witnesses, and evidenced by the writing addressed to Uniacke, by which he bound himself never to ask for the names of Marshall or Chesley. To recover, the plaintiffs have to over-ride all the difficulties which are stated above; they have to say that James V. Gavaza *was* one of the creditors to whom the offer was made, and *was* one of the creditors covenanted with in the deed; they have to say that the authorization to the assignee to convey the estate to Chesley meant nothing, so far as this claim was concerned, and, when they came to deal with the express agreement not to ask for Marshall's and Chesley's names, they have to say that James V. Gavaza was not bound by this renunciation, because the notes of his fellow insolvents, (which notes he had agreed to be content with,) were not given him. Of course, if he was not entitled to a composition note, as any other creditor was, and had not compounded his debt, he was not entitled to any note at all, and therefore cannot base his claim on the non-delivery of a note to him signed by "the firm," as he calls his fellow insolvents; but even supposing that he was entitled to the notes of his fellow insolvents, and that such notes were not given to him—what then? The question may be answered

by suggesting several remedies that he would have had, but it can hardly be answered by saying that in such case he became entitled to a note of a different character altogether, made not only by his fellow insolvents, but by two other persons, a note which, although on its face payable to him, had never been delivered to him or to any other for him, but had been delivered to Uniacke to satisfy a mistaken notion of that gentleman's responsibility to protect him from some purely imaginary liability, and to induce him to go forward with the proceedings on which all the Gavazas were to get their discharge. Mr. Uniacke, however, conceived the idea that there was an agreement to which he was a party, for the making of composition notes by the defendant Gavazas to James V., and that when such agreement was broken by the Gavaza defendants, a suitable penalty was the delivery by him to James V. of these instruments, which were in his hands, bearing the names of Chesley and Marshall, who at least, may fairly complain of such a punishment being visited on them, as they had never made or broken any such agreement. We have arrived, therefore, at the conclusion that there was no consideration for this note, that there never was any authority or consent for its delivery to James V. Gavaza, and that the assignee delivered it under a mistaken view of his powers and of his duty. We cannot concur in the view expressed by the learned Judge of the County Court, that the getting of the estate by Chesley could be held to be a consideration. He held the estate, we think, to secure him in respect of liabilities, of which this was not one, as already stated. Uniacke could not have refused, after the execution of the deed of composition, to deliver the estate to Chesley, even if the latter had not signed these notes, payable to J. V. Gavaza, and we could not hold, in a suit by payee and maker, which this suit virtually is, even if Chesley's security covered this liability, that the taking of security by the maker forms a consideration for the note. We also think, for the reasons above stated, that the learned Judge was mistaken in treating the agreement between Chesley and Uniacke, or rather, the refusal of Chesley to give Uniacke authority to deliver the notes to J. V. Gavaza, as an oral contract made to vary the deed of composition or the notes. The deed contained no agree-

ment on the subject, (especially so far as Chesley and Marshall were concerned,) and the question whether the note can be varied by an inconsistent oral agreement does not arise here. The note could not be a contract until delivered to J. V. Gavaza, or to some one with authority to deliver it to him at some time or other, and here no such delivery was made to J. V. Gavaza, and no such authority was given to Uniacke. The principles on which a person who has executed an instrument, is allowed to restrict its delivery or to suspend its operation as a contract, are not at variance with those which prevent such a person controlling the instrument after he has delivered it to the other contracting party, (or otherwise brought the instrument into force,) by a parol agreement inconsistent with its terms; nor are these principles, by any authority which has been cited, or which we can find, held to be inapplicable to a case in which, as here, the maker of the instrument stipulates that it is never to be delivered or to have any effect. In such a case perhaps the more accurate statement of the rule is that the instrument is not to be considered as having been made as a contract, any more than if it remained in the possession of the maker. "If this note was to remain in Uniacke's hands," says the learned Judge below, "it could never be enforced against any of the defendants." This we believe to be a correct statement of the position, and that such was the stipulation at the time of delivery, is not disputed by anybody, Uniacke himself testifying, "you," Chesley, "always told me not to give them up to nybody." When the learned Judge adds: "I feel satisfied that no case can be found either at law or in equity, where such a defence has been sustained," he may be considered as rebuking with much reason the absurdity committed by all the parties here, the absurdity of a sham contract being signed to satisfy the mistaken scruples of one who supposed his duty required him to certify that such an instrument was in his possession; but he is mistaken in supposing that such a defence is without support in the reported decisions. The defence not only comes within the pale of the general principles, which we have referred to, but is within the line of several reported cases. In *Pym v. Campbell*, 6 E. & B., 370, there was, as here, a written contract signed and given to another, but subject as to its operation to

a condition precedent. The present is a stronger case, because the contract here could not have vitality under any conditions. In that case ERLE, J. said:—"I grant the risk that such a defence may be set up without ground, and I agree that a jury should, therefore, always look on such a defence with suspicion; but if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." CROMPTON, J., said:—"The parties may not vary a written agreement, but they may shew that they never came to any agreement at all, that the signed paper was not intended to be the record of the terms of the agreement, for they never had agreeing minds. Evidence to shew that does not vary an agreement and is admissible." Lord CAMPBELL, said:—"I agree. No addition to or variation from the terms of a written contract can be made by parol, but in this case the defence was that there never was any agreement entered into. Evidence to that effect was admissible, and the evidence given in the case is overwhelming." *Davis v. Jones*, 17 C. B., 625, is an authority to the like effect; also *Wallis v. Littell*, 11 C. B., N. S., 369, in which ERLE, C. J., said:—"We are of opinion that the evidence was admissible. In *Pym v. Campbell* and *Davis v. Jones*, it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow, it neither varies nor contradicts the writing, but *suspends the commencement of the obligation.*"

The defendants, as we have said, seem to have acted under the impression that J. V. Gavaza was entitled to receive a composition of fifty per cent of his claim, and one of the defences set up here is that irrespective of those notes, his fellow insolvents settled with him for his composition by giving him a note for a smaller amount, with P. Bonnett as a co-surety, and that he accepted it in full. The pleading in this point is perhaps

technically defective, but it gives notice of the defence and was not excepted to. The statements in support of this defence are explicitly denied by J. V. Gavaza, but they are as explicitly affirmed by his two brothers and P. Bonnett, who are corroborated, as to part of the story, at least, by Chesley, while J. V. Gavaza is met by the fact that in March, 1880, while, if his present story be true, two composition notes, the one now sued on and another for an equal amount, were in Uniacke's hands for him, or while at any rate there was, according to him, the 50 per cent composition due him on upwards of \$1,750 from his brothers, he applied to Uniacke and another person as Commissioners for giving relief to insolvent debtors, to be released from jail, and swore to the truth of a schedule in which he set forth that he had no real estate, no personal estate and no debts due to him. This he might have done truthfully, if the claim which he had held against his brothers had been disposed of by the Bonnett note. Of this schedule and oath he gives no explanation. We think that on this vital question of fact the evidence was overwhelmingly against him, and so we are disposed to think the learned Judge below would have found, but for two difficulties. One he states thus: "But if so it is a mystery to me why the notes should have been given to all." The second he states thus:—"The mystery becomes still greater, if I am to understand the parties that this note was given some days before the composition notes were." These difficulties appear to us to have been resolved by the undoubted fact that Uniacke insisted on having the composition notes made and put into his hands, whether they were deliverable or not, and whether James V. Gavaza was entitled to them or not, before he would certify or otherwise proceed with the business of the discharge. It is true that long after the settlement is alleged to have been made, and when J. V. Gavaza was attempting to get the notes from Uniacke, and while the latter was threatening to give them up unless notes of the other insolvents without Marshall's and Chesley's names were given to him for the amount of the composition, Chesley promised him that the required notes would be given, and so did Norman Gavaza, although the latter declared that the Bonnett note had settled everything. But these assurances were entitled to little weight

as acknowledgments. They were part of a course of pleading remonstrance with Uniacke against the giving up of the notes, and, so far as Chesley was concerned, he does not appear to have had a personal knowledge that the Bonnett transaction had been consummated.

The appeal should be allowed with costs, and judgment be entered in the cause for the defendants.

CHESLEY v. GAVAZA ET AL.

Before McDONALD, C. J., and SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided December 15th, 1883.)

Stephen et al. v. Gavaza applied.—Finding of County Court Judge on facts reviewed.

This was an appeal from a decision of SAVARY, County Court Judge, in favor of defendants, in an action brought by plaintiff on a promissory note made in his favor by James V. Gavaza and Norman A. Gavaza. The question involved was identical with that in the case reported above of *Stephen et al. v. Gavaza et al.*, both cases being argued together. The decisions in the present case are, therefore, to be considered as applying equally to the previous case of *Stephen et al. v. Gavaza*.

THOMPSON, J., (December 15th, 1883,) delivered the judgment of the Court:—

This cause was argued with *Stephen et al. v. Gavaza et al.* It is an action by T. W. Chesley against James V. and Norman A. Gavaza on a promissory note dated 19th March, 1880, for \$60, payable in three months. The last mentioned defendant made default. The other defendant put in grounds of defence which were set aside as false, etc., and then, by leave, put in as added grounds of defence, a set off of a note made by defendant along with Norman, Milledge and John Gavaza and Sarah Marshall, to him for \$307, dated 31st November, 1877, payable in twelve months, being another of the so-called composition notes, such as formed the subject of the plaintiffs' claim in the last suit, and the same having been given by

Uniacke to the now defendant under the same circumstances as the note there declared on. The defences which were material to the last suit were made the subject of replications here. In the Court below no exception was taken to the set-off not being maintainable in an action against these two defendants on their joint contract, and the point was omitted from the rule for appeal. The motion to amend the rule at the argument, to enable the point to be taken, stood therefore very unfavorably, but we do not think the point necessary. All, or nearly all that has been set forth in the judgment in the last cause, against the plaintiffs' case, applies here to the set-off, while a number of additional circumstances show both the illegality and dishonesty of the defence:—

1st. The note sued on was endorsed by plaintiff to relieve defendant from an execution; it was made long after the note set up as a defence was due and unpaid, and at a time when defendant, if he had a right to that note, had only to use it, instead of asking plaintiff to endorse for \$60, giving him, as he did, his watch as security for such endorsement.

2nd. On the day the note sued on fell due defendant wrote to plaintiff stating that it was due, and saying: "Will you please renew for me and I will give you the money to take up this note before the time expires—sure."

3rd. Defendant avers that he was claiming all along that there was money lying in Chesley's hands but he did not claim composition money, so far as appears, and made no use of the composition notes.

4th. The set-off was an after-thought, and was put in after all other grounds of defence had been set aside, although defendant had procured the note from Uniacke more than twenty days before the suit was commenced.

5th. Chesley testifies that before he put his name on the \$307 note, defendant told him of the Bonnett settlement, *i. e.*, that he had "settled his claim against the estate of J. A. Gavaza & Sons," * * "that it was settled in full, * * he had told me over and over again he had no claim against me on these notes." Defendant does not deny these statements.

6th. Defendant, in this case, attempts to explain what occurred on his application for discharge to the Commissioners, and in a characteristic way treats his oath and schedule as not of sufficient consequence to be explained and reconciled with the claim here, or as not susceptible of being so explained; and the only thing deducible from his explanation is that he was not discharged by the Commissioners, "but had it fixed up because he feared to make an assignment to the creditors lest thereby he would lose his chance to secure the claim which he now sets up, and to recover the other composition notes. This story, instead of diminishing the damaging effect of the oath and schedule, as he seems to have hoped it would, immediately increases the weight to be attached to those matters, because it shews that when the oath and schedule were made the claims now set up were not overlooked or forgotten.

This appeal also should be allowed with costs, and judgment below should be entered for plaintiff for the amount of note and interest.

SMITH and WEATHERBE, J J., concurred.

MCDONALD, C. J., dissented.

RIGBY, J.—A phase of this case and of *Stephen et al v. Gavaza* was, for the first time, suggested at the last argument of the cause by my brother THOMPSON, arising out of the fact that the payee of the note declared upon was himself one of the insolvent firm, and had signed the deed of composition only in that capacity, and was not one of the three creditors intended to be secured by such a note as the one declared upon. These facts are elaborated in the opinions of the learned Judge just read, and in which opinions I agree, in so far as they decide that the plea attacking the consideration of the note was established under that view of the facts, and that upon that ground the appeals should be sustained with costs.

**ALMON ET AL. v. THE PROVIDENCE-WASHINGTON
INSURANCE COMPANY.**

Before McDONALD, SMITH, and WEATHERBE, J J.

(Decided December 16th, 1883.)

Constructive total loss.

WHILE on a voyage from Boston to St. Pierre, the vessel insured by the defendant Company mis-stayed and struck off Isle Madame. During the night the tide fell and the vessel was thrown over on her side and damaged. Surveyors recommended that she should be stripped and sold. This was done and the vessel realized \$140. The purchaser got her off and after an expenditure of \$2000, more or less, including the price, ran her for two years, at the end of which time she was sold for \$1800; but at the time of action brought she was lying in Arichat Harbor (to which she had been taken) locked in ice and unrepared. There was evidence of negligence and want of energy on the part of those in charge but not amounting to baratry. The Court, having power to draw inferences of fact as a jury, sustained the finding of the Judge in favor of plaintiff as for a constructive total loss.

This was an action on a policy of insurance on freight under deck on board the schooner *A. Carcaud* from Boston to St. Pierre. While on the voyage the vessel mis-stayed and struck on a bank off Isle Madame or Jamrins Island. During the night a gale sprung up, and, as the tide fell, the vessel was thrown over on her side and damaged. A survey was held on the 21st November, 1878, as the result of which it was found that the vessel was bilged, the tide rising and falling in the hold, the main stem or rudder post and rudder casing gone. In view of her damaged state and exposed position the surveyors recommended that she be stripped and sold for the benefit of all concerned. She was sold accordingly and realized the sum of \$140. The purchaser of the vessel succeeded in getting her off, and after spending a large amount in repairs, ran her for two years, and then sold her for \$1800. Three fourths of the cargo was sent on to its destination; the balance was sold in a damaged condition.

The cause was tried at Halifax in April, 1881, before WEATHERBE, J., when a verdict was entered for plaintiff by consent for \$300, subject to the opinion of the Court, who were empowered to draw inferences of fact as a jury might and enter judgment for defendant, or order a new trial, or reduce the amount of verdict, with full power to direct as to the costs of trial or other costs.

The rule was argued April 18th, 1882, before McDONALD, SMITH, and WEATHERBE, J. J. by *Graham*, Q. C., in support of rule, and *Ritchie*, Q. C., contra.

Graham, Q. C., in support of rule.—Cites *Almon v. Pugh*, where the Court on nearly the same evidence, in an action on a policy on the same vessel, set aside a verdict against the underwriters. There was not a constructive total loss of freight in this case, because there was not a constructive total loss of the vessel, and it was not contended that there was a constructive total loss of the cargo. The vessel should have been repaired. The cost of repairing her would not have exceeded her value when repaired. There was, therefore, no constructive total loss of the ship; *L. R.*, 1 Q. B., 620; *18 C. B., N. S.*, 835; *L. R.*, 2 C. P., 204. (WEATHERBE, J.—If the vessel was constructively lost you admit you would be liable.) Not necessarily. There is no evidence of what the vessel was worth when repaired, or what it cost to repair her. Cahoon proves she was not worth \$1000, and LeBlanc \$800, unrepaired. She cost \$2000 when first purchased, two years before. The captain, by giving up the goods without receiving the freight, cannot throw the loss on the underwriters on freight. The evidence does not show barratry. Supposing the vessel was driven ashore barratrously, this would not constitute a constructive total loss of the ship, unless the vessel was injured by the barratry so as not to be worth repairing. No sufficient proof was given of the contents of charter party, or of the execution of it. To prove interest in freight it is necessary to prove some interest in the vessel; *2 Phillips on Insurance*, sec. 2123. No such interest was proved. Notice of abandonment by mortgagor is not sufficient.

Ritchie, Q. C., contra.—There was barratry throughout on the part of the master. It does not require a total loss of the vessel to make a total loss of freight. If the voyage was broken up and the captain wrongfully delivered up the freight, it was a total loss of the freight; *Jackson v. Union Marine Insurance Company*, *L. R.*, 8 C. P., 572, and *L. R.*, 10 C. P., 125. *Kidston v. Empire Insurance Company*, *L. R.*, 2 C. P., 357, is an authority for a recovery under the suing and laboring cause. There may be a total loss of the vessel or not.

In this case the freight was totally lost as the voyage was broken up and the cargo was wrongfully broken up. We ought not to be bound by the cost of repairing, as the purchaser may have been able to repair at the place of sale at a much lower cost than the owner could have done.

Graham, Q. C., replied.—*Jackson v. Union Marine Insurance Company* was a case where the vessel was prevented by perils of the seas from reaching the port where the voyage was to commence, in time to fulfil her charter party, and it was rescinded by her charterer. Here the vessel had entered upon the voyage and the ship owners could keep possession of goods, repair the ship, and send them on, or charter another for that purpose.

WEATHERBE, J., (December 15th, 1883), delivered the judgment of the Court:—

This action is for chartered freight on a general cargo of merchandize shipped on board the schooner *A. Carcaud*, 69 tons, on a voyage from Boston to St. Pierre, Miquelon. The vessel left Boston 28th October, and having met with heavy gales sprung a leak, and after endeavoring to make Halifax, in distress, reached Glasgow Harbor, near Cape Canso, on the 6th or 7th of November. Here the deck cargo was discharged and the vessel put upon the beach and a survey held. Some repairs were made and, in accordance with the recommendation of the Surveyors, the vessel proceeded to Port Hawkesbury, in the Strait of Canso, for the purpose of being put upon a Marine Slip there (no accommodation being procurable at Glasgow Harbor,) for further repairs before proceeding on her voyage. She left Glasgow Harbor on the 12th for Port Hawkesbury, calling the same day at Canso for coal, water, and provisions, sailing on the 13th at 2 or 3 o'clock in the afternoon, and, on same evening, went ashore on the bank off Isle Madame. The wind blew a gale that night, and when the tide ebbed the schooner fell over on her side. There is evidence that about one-fourth of the cargo was damaged and sold, and the rest of it was sent on by Boston underwriters, whose agent, on the evening of the 14th, agreed with the master of another vessel to forward it, which was afterwards done. There is evidence that on the morning of the 16th the spindle and brace and

part of the rudder were gone, and the vessel was hogged ; and there is evidence that the bottom was broken and the tide rising and falling in the hold. After still further disaster, the hull and materials, having been several times advertised, were sold on the 26th November for \$140. A verdict was taken by consent for plaintiffs, as for a total loss of the vessel, with a rule *nisi* to set the same aside, which was argued on the ground chiefly that it was against the evidence. The owners reside and the office of the underwriters is at Halifax, where notice of abandonment, which was not questioned at the argument, was given.

Under these circumstances, if there was a total loss of the vessel plaintiff must succeed. In determining this our difficulty would be less but for the contradictory nature of the evidence, from which we have power to draw inferences of fact as a jury might. Was this voyage broken up by the total loss of the vessel? She remained in specie and the question arises whether a prudent uninsured owner or an underwriter on the ship would have got her off and repaired her. She was on the open coast, exposed to the gales of the ocean and the irreparability at the place of stranding is admitted ; and the question is whether a prudent owner without insurance would have determined to repair temporarily so as to put her afloat, take her to a safe port of repair, and there have submitted to the delay and expense of restoring her to a sea-worthy condition so that she might have pursued her voyage and earned her freight. Putting out of the case the evidence to establish the validity of a sale, except so far as the efforts made, and the result of those efforts to dispose of the vessel, throw light on the nature of the damage which she sustained, is her irreparability made out—not in a physical sense, because that would be an absolute total loss—but in a technical, constructive, commercial or prudential sense—is the irreparability of this vessel made to appear so as to sustain this verdict? This is the case to be made by plaintiff.

Again and again the difficulty of this branch of the law has been admitted. In the original text of *Arnould*, and the difficulty has not decreased since, it is said that "what amounts to a case of constructive total loss is nowhere accurately defined in English law but forms a difficult and

intricate matter of investigation." Some of these cases may be simple enough. The most difficult of them reach the Courts. In many of these cases, and this is one, we have to consider many things; the decided authorities require us to consider many things in estimating what is usually called the cost of repairs. We have to take into consideration,—a jury, or a judge acting as a juror, has to consider in addition to the ordinary general repairs:—

1. Difficulty and delay at place of stranding in obtaining materials and labor.
2. Favorable or unfavorable season of the year for repairs.
3. Expense of raising the vessel or extricating her from her stranded position.
4. Temporary repairs to float her to a safe port.
5. Expense of travel, telegrams, and superintendence of the work.
6. Expense of towage and lighterage.
7. Repairing of decayed portions of the vessel; *Phillips v. Nairn*, 4 C. B., 343. (See also *Lowndes*.)

At the time of the alleged sale of this vessel on the exposed coast where she lay, and at any period while stranded, not one of these items would probably have been unconsidered by a prudent uninsured owner, and, though nothing is to be conjured up or magnified or allowed for a too despondent owner's views, yet, as *Phillips* observes, no more stringent rule is required in establishing a case of this kind than of any other. I am dealing now with the stranding and the abandonment, I will presently dispose of the defeasibility of an acquired right to abandon. Another thing to be considered by an uninsured owner is the value when repaired. The amount which may be obtained for the wrecked material is to be considered. If this is estimated at the value of old material merely and not as a repairable vessel, it must be deducted from the contemplated value of the repaired vessel in the other side of the account in deciding whether to repair. And then the freight of a vessel is a very considerable proportion of her value, and if this owner should have a vessel in the spring in or near Arichat, an important item for consideration would be the loss of the cargo, and thereby a freightless vessel

instead of one from which profits were immediately to be derived. (See the cases cited in *Lowndes*.)

The first two things to be considered before the vessel should be floated by an owner in estimating for repairs, (and these two things would at once occupy the attention of the jury on the evidence,) were 1st., the extent of the injury to the hull and outfit; and 2nd., the difficulty of extricating the vessel. The evidence no doubt is unsatisfactory. If it were clear our task might be merely nominal. It was the master's duty, to his owner at least, to have investigated this, so as to furnish proof, and it may be said the owner is bound to make out his case. The master's neglect and want of vigilance is one thing. That will be dealt with presently. The state of the wrecked vessel is quite another. Is there evidence on the point to satisfy? It must be admitted, as the fact that the highest price that could be realized was \$140. I cannot understand how it was not all worth that much for old material, and I think a jury would be justified in so finding. That no one in the vicinity could be found to give more after all publicity is the strongest evidence that the hull was most seriously shattered, or the difficulty and expense of getting it afloat very great, or both, and that restoration was next to hopeless. Or to put it more practically, a prudent man might say, "although it is not physically impossible to restore this wreck to the sea as a sea-going vessel, yet as I find this mass of material in the form of a vessel, an old vessel, in this position only to be worth in cash the value of old wood, iron, rigging and sails, it will not pay to run the hazard of getting a sea-going vessel in that way. It will be more profitable, business-like, safe and prudent to take this \$140, for the plaintiff has a right to have that considered, and add to it \$1,670 (or whatever the sum may be) and build or buy a vessel." There are strong statements in the evidence of witnesses accustomed to the sea and coasting on both sides, that the vessel was not worth getting off and repairing, but it must be admitted that the fact that the highest price that could be got for the wreck taken singly is a most convincing piece of testimony on that point for a jury. There is a wide scope in the evidence before us respecting the probable cost of the one item of getting this vessel afloat, all the way I

think from \$50 to \$800. It must be evident that without the light of the actual experiment yet to be considered that it was impossible to ascertain exactly the expense of that operation, and without the evidence of that experiment to guide us, I cannot understand that the verdict based on the latter amount could be disturbed unless we had power to draw a contrary inference ourselves.

The line is to be drawn, (as I understand the authorities,) between an absolute and constructive total loss at the actual impossibility of repair. When a thing is so damaged that, literally speaking, repair or restoration is out of the question, the loss is absolute. When the thing can be rescued so as to afford a basis to enable the operation of unprofitable repairs, that is the case of a constructive loss of the thing as effectual as if it were annihilated. Therefore it is obvious that this is a question of fact rather than of law. The keel, stem and stern-post and some specific timbers and spars still framed together of a ship, for example, survive the peril. A total loss is obvious, but the judicial mind would fail to determine, and an equal number of skilled witnesses would respectively assert affirmatively and negatively whether restoration by adding material was worthy the name of repair, and thus present the most difficult question of weight of evidence which would nevertheless require judicial determination. Given, in such case, a judgment in favor of possibility of repair, is it not evident how unprofitable might be evidence of a survey with detailed estimates of probable cost of repairs. While detailed estimates are quite usual, I never understood that expert or skilled evidence from which proper inferences can be drawn of the unprofitableness of attempts at repairing a damaged ship was not available to settle the issue of fact even in opposition to detailed estimates of probable cost and ignoring all nice arithmetical process whatever, and I was not surprised on suggesting this at the argument that defendant's counsel did not dissent from this view. In *Robertson v. Clark*, 4 Bing., 445, the ship was held not worth repairing without any estimate of expense of repairing being given in evidence; and in *Robertson v. Majoribanks*, 2 Starkie, 572, ABBOTT, C. J., told the jury the question was whether the master, exercising the best discretion he could upon the subject matter,

was not justified in abandoning the ship without entering into a nice and minute calculation. A ship returned in distress to her port of departure valued in the policy at £12,000, and the master obtained a survey estimating the damage at £3,710, which would put her at sea to earn £4,000 freight. She would be worth, according to the survey, more when repaired. She was sold for £1,734 and repaired for £240. WILDE, C. J., left it as a question for the jury to say upon these facts whether the vessel was susceptible of repair to perform her voyage, (the action was for insurance on freight,) at a cost exceeding her repaired value. One of the questions before the Court was whether a verdict for defendant should not be set aside as against the weight of evidence and the case was held to be one, on that evidence, for the jury. This case may be considered in point because it seems to have been so treated that if the verdict had been the other way it would not have been disturbed; *Moss v. Smith*, 9 C. B., 93.

The author of a small work on Marine Insurance, already mentioned, (*Lowndes*, p. 141,) cites *Currie v. Bombay Native Insurance Co.*, L. R., 3 P. C., 79, to show in support of the rule that the assured in selecting the period for abandoning, has no right to lie by to watch the chances and changes of the market, that no delay can be permitted for procuring surveys and estimates if sufficient information is already at hand to guide a prudent owner.

Phillips carefully draws the distinction between those cases of constructive total loss where Courts are to be guided by the cost of repairs and value when repaired and other cases. He adopts as the test the conduct of the prudent man, and mentions the case of cost of repairs exceeding the value when repaired as one instance within the rule. "That is to say," is his language, "if the expense of repairs and the sacrifices that must be made as connected with the prosecution of the voyage * * * would exceed the value of the ship when repaired;" and he adopts the statement of PATTESON, J., before the House of Lords, that "a vessel is totally lost when it becomes of no use or value as a ship to the owner," as embodying the true doctrine. He says the rule of English Jurisprudence as to cost of repairs

"has reference to a case in which the amount merely determines the character of the loss. Other circumstances may come into consideration in determining the loss to be partial or total." And he controverts in this connection the mistaken idea that there is an unusual burden on the demandant to make out his case in showing the excess of expense over value of ship which he says would be assuming the presumption to be against total loss; *Phillips on Insurance*, 259-60.

There is evidence in this case of repairs after the date of action, cost of repairs and value when repaired.

Applying the evidence, and its admissibility was unquestioned at the trial or argument, how is this case affected? What is there to support or disturb the verdict, or what inferences are we called upon to deduce in favor of defendant. The purchaser of the disabled schooner, who had a contract for a government pier in the vicinity, spent about \$2,000 in repairs, inclusive of the price, and afterwards the highest price that could be obtained for her was \$1,800. At the time of the purchase he expected to get her off in the same direction in which she was driven up by the gale, which I understand by the master's evidence, was considered, as the event showed, impossible. A trench or temporary canal therefore was required to be dug, an eighth of a mile in length, the labor for which was available only at low water. She was got off after operations protracted till the 25th December, and taken to West Arichat, still unrepaired, on the 26th, only a day previous to another gale and snow storm, which, according to the evidence, would have been likely to have summarily settled the question of repair, and then sinking at the wharf she became frozen up in February, where the evidence leaves her at the time of action. She was raised in the spring and put upon the beach for repairs, which occupied a very long time. The expenses of getting her afloat and into Arichat, and repairs there, reached \$2,000; and two years afterwards, when in good order, the highest price she would bring was \$1,800. We were asked on behalf of defendant, at the argument, to deduct something from the \$2,000 expended in restoring the wreck for new sails, and about \$139 for spars. I think it may fairly be inferred from the evidence that new sails were required. If a jury

were permitted to allow for the wreck as old material, (see *Lowndes*,) that could probably offset the spars. Then there was a considerable sum expended in attempting to save the vessel previous to the sale, and a jury would not be prevented from considering some of the matters as fit matters to be weighed by a prudent uninsured owner. And if anything further was required I should think a per-centage in the ordinary course of business might be allowed on the ground that the purchaser was a resident of the neighborhood and could control the expense.

Moreover, in the usual mode of doing business in an account of expenses of this kind the purchaser, I suppose, would not charge for his own time and skill, which a prudent owner would consider. I do not say a jury might not allow something against all this. I think the balance in any view would fall against the value of the repaired vessel.

A question has been raised in consequence of the defeasibility of the right of abandonment. It is said the plaintiff cannot recover because the vessel was restored to navigation. Admitting the widest interpretation of the authorities justifying an underwriter in insisting on changing that which was a total loss, because at some period abandonment took place on account of the apparent hopeless condition of the vessel, into an average loss, this case does not come within the most extended decision or dictum on the subject. Where all reasonable hope of repair, rescue or restoration of the subject matter of insurance has, for the time being ceased, it has always been said the right of abandonment accrues to the assured. In England, at variance with the Continental and American, and I believe the Scotch rule, this right was authoritatively declared not without judicial opposition and protest even from so high a source as Lord ELDON, who, at one time, intended to take the opinion of the twelve judges on the point, to be subject to divestment at any time before action in cases of recapture where the loss was by capture. Text writers seem to be unanimous in stating the rule upon principle to have general application in England, though the question does not, I think, arise here. It is not and never was anywhere denied that the validity of an abandonment once rightly made remains indefeasible in case of capture, or

in any case whatever, unless the subject matter insured is before action, either restored to the possession of the assured or is in the country in a condition to be possessed by him. I am unable, upon consideration, to understand how any such question can be raised in the case except upon a misapprehension of the facts. This action was brought on the 1st of April. It is fair, I think, to presume that at that time the *A. Carcaud*,—the evidence is conclusive,—was sunk and locked in the ice in the harbor of Arichat unrepaired. Therefore, if a right of abandonment ever accrued in this case it has not been divested. There was no question of law on the subject before us. It was a mere question of fact which is disposed of.

Thus far, the conduct of the master and the want of effort, negligence and misconduct on the part of those in charge of the vessel have not been discussed. It cannot, in the most favorable light in which his action can be regarded, be denied that the master failed to resort to all the means within his power to extricate the vessel, even if he was not the author of those means which the mate confesses he assisted in to prevent her from floating. We must draw the inference of fact that there was great negligence and want of energy on the part of those in charge, which we have hitherto refrained from mentioning, and it now becomes necessary to apply the law which governs this feature of the case.

"Losses," says the editor of *Arnould on Marine Insurance*, (5th ed., page 758,) "that are attributable to any of the perils insured against, though occasioned by the negligence or misconduct of the agents of the assured not amounting in the latter to barratry are covered by an ordinary policy. 'We are all of opinion,' said Lord TENTERDEN, 'that underwriters are responsible for the misconduct and negligence of the captain and crew, but the owner, as a condition precedent, is bound to provide a crew of competent skill.'" This is the law of England and seems at length to be the law of the United States.

The language of *Arnould* himself is this (2nd ed., p. 770): "The principle established by the more recent authorities in this country is that, supposing the vessel, crew and equipments to have been originally sufficient, and a captain to have been provided of competent skill, the assured has done all

that he contracted to do, and the underwriter is in such case liable for any loss proximately caused by the perils insured against, although it may have been remotely occasioned by the negligence or misconduct, (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consist in omitting some act which ought to be done, or doing an act which ought not to be done in the course of the navigation ;" and he cites cases in 2 B. & Ald., 72 ; 5 B. & Ald., 171 ; 7 B. & C., 219, 794 ; 2 B. & Ad., 380 ; 5 M. & W., 405 ; S. C. 8 M. & W., 895 ; 14 M. & W., 476.

In commenting upon the case in 2 B. & Ad., 380, *Phillips v. Headlan*, Arnould says, (2nd ed., 772,) " Lord TENTERDEN said that even if the loss had happened in consequence of the mistake of the master, provided he were a person of competent skill at the time when the policy was made, yet having been proximately caused by the perils of the sea the underwriters would be chargeable ; a *fortiori* they were so, as he appeared to have acted with a sound discretion." *Dixon v. Sadler*, 5 M. & W., was a case where the underwriters were held liable though the ship was lost by being blown over on her beam ends, owing to the improper conduct (not barratrous) in throwing over too much ballast. The jury had found negligence. In *Redman v. Wilson*, 14 M. & W., 476, the right to abandon was maintained and recovery for a constructive total loss was established where the vessel having become leaky in consequence of negligence and unskilfulness in loading the ship, was run on shore and lost. PARKE, B., in giving judgment said, in *Walker v. Maitland*, 5 B. & Ald., 171, (recognized and acted on in *Bishop v. Pentland* 7 B. & C., 219 ; 1 Mun. & Ry., 49,) that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril insured against, but remotely arising from the negligence of the master and mariners." *Bishop v. Pentland* decided that where a vessel negligently moored in a tide harbor fell over and became injured, this was a stranding for which underwriters were liable. In *Davidson v. Burnand*, L. R. 4, C. P., 117, the question was raised respecting injury to insured cargo injured by reason of negligent management of the machinery of a freight steamer. It was held 1st, that the injury was by one of the perils

insured against, and 2nd, that the burden of proof of unseaworthiness was on the defendant. WILLES, J., in his judgment distinctly adopts the report which attributed the injury to negligence, and KEATING, J., said, referring to the negligence, "that, in my opinion, is sufficient to make the underwriters liable. The question is the same as it would have been if by the falling of a mast through the vessel or other negligent act of the crew, the vessel had sunk in deep water and I think the loss * * * is, within the meaning of the policy, a loss caused by the perils insured against."

I need scarcely refer to the passages in Arnould and MacLachlan or to the cases to shew that the incompetency of the master or the insufficiency of the crew at the outset of the voyage is to be taken advantage of by plea of unseaworthiness. If the ship was then seaworthy the risk attached and the subsequent inefficiency is included in the "perils," provided the maxim *causa proxima* applies, as it does here. Nor need I take time to show that the underwriters are excused if the loss is attributable directly to the negligence or acts of the assured or his agents. "A policy being made against all risks, the Court said it applied to all losses except such as arise from the fraud of the assured." *Phillips on Insurance*, 911; but *Phillips* says, 1049, "The better and now established doctrine is that the underwriters are liable for a loss occasioned by a risk expressly insured against, though it is a consequence of the negligence or mistake of the master or mariners supposing the ship to have been provided with a competent master and crew and that there is no want of good faith and honesty of purpose."

The Editor of *Arnould*, (5th ed., 745,) in commenting upon the text of Emerigon that the underwriter of an insured ship is not liable when collision is owing to master and crew, points out Marshall's view to be, that the wilful misconduct of captain and crew would amount to barratry. Parsons, (*2 Parsons on Ins.*, 182,) cites Federal and State decisions to shew that no abandonment is valid unless the master has "examined sedulously," (whatever that may mean in this connection,) "and used to the best of his skill and power all

means for recovery." If that principle is to be applied to this case I think the plaintiff cannot recover, and, in so far as our decision in *Almon v. Pugh* went upon that ground, it is not I think law, although with the verdict before us in that case our judgment could have been sustained on other grounds. I tried that case upon part of the very evidence now before us, and I desire to take this opportunity of stating what I stated when this cause came for trial before me, and what I had previously suggested, that I there misdirected the jury on this question of the master's conduct, in not distinguishing between the position of the master and the assured.

There may be, and I suppose there is, a difficulty in drawing the line between misconduct not barratrous and barratry within the meaning of the term in the policy, because it appears that neglect in the master to rise from his berth to prevent acts of scuttling and firing the ship is *prima facie* barratry. *Heyman v. Parish*, 2 Camp., 149. And so is wilful conduct of the master going to sea in bad weather having refused to sail with a fair wind, and wilfully disregarding the pilot's instructions; *Herbert v. Martin*, 1 Camp., 548. Whatever may be the rule respecting the master's negligence and misconduct where the ship has been sold, it must, I think, be confessed that the language of the judges in decided cases would lead one to infer that the want of vigilance and good faith, qualities which, of course, are in all cases due from the master, were confined, in holding the absent, innocent owner responsible, to cases of sale only, and not to all cases of abandonment. For otherwise the law must contemplate two kinds of vigilance and good faith, one an extreme kind and another not so utterly stringent, which seems to me absurd.

In *Arnould*, 5 ed., 940, the author in speaking of duties of the master in cases of abandonment says:—"Immediately therefore that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defence, safeguard and recovery of the thing insured." What is the penalty for breach of this duty he nowhere says. He refers to Kent who says, 3 *Kent's Com.*, 331, in discussing the duty of the insured in case of loss that "it is the duty of the master, resulting from his situation, to act with good faith and care and diligence for the protection

and recovery of the property *for the benefit of whom it may eventually concern*," shewing that the reference applies to the period after the circumstances have arisen to support an alleged abandonment.

If the rule measuring the validity of a sale by the physical, mental and moral qualities of a shipmaster extended further in the United States than in England, and applied to all cases of abandonment, I can understand that it would be supported by writers in the American States on the absolutely indefeasible character of abandonment in that country.

It may be worth while, when the validity of sale is questioned for the want of these qualities, to enquire after all whether the test requiring their exercise is not intended to be applied after the right of abandonment has accrued, even in cases of sale by the master, and whether, if exercised after that period, a sale would be invalidated even although misconduct of master or crew more or less remote had brought the ship to face the perils insured against.

Many dicta on the subject of the misconduct of master are misleading, as for example the remark of LAWRENCE, J., in *Tatham v. Hodgson*, 6 T. R., 659, that "I do not know that it has ever been decided that a loss arising from the mistake of the captain, was a loss within the perils of the sea;" and that of Lord CHELMSFORD in *Currie v. Bombay Native Ins. Co.*, 3 P. C., 73, where he asks how it is possible for the assured to recover a loss made total by the negligence of the captain, whose exertions might have saved the cargo. In the one case the marine risk was on a cargo of slaves who died from starvation by reason of delay of the voyage from perils of the sea, but the case turned on the words of the statute prohibiting such insurance where loss is occasioned by natural death and ill-treatment. In the latter case the question arose upon a cargo which the captain sold at public auction, unnecessarily, on a voyage from Liverpool to Madras. And so of many other cases, where, in the opinion of the judges, the language seems to be general but was not so intended.

By the practice of our Supreme Court the rule is that Insurance causes are tried here without a jury. The exception is for the party requiring a jury in applying for it with

his first pleading to deposit a fee. The plaintiff did this and when the cause came to be tried before me, I suggested barratry as an issue to be submitted, and afterwards a verdict was taken by consent, and on the argument Mr. Ritchie, as one ground to sustain the verdict, urged that the evidence of barratry was sufficient to prevent a new trial. I have carefully read the evidence with a view to ascertain whether the loss of this schooner in any way was designed by the master, either by his running her on shore or neglecting means for, or actively preventing her restoration, and I am of opinion that if a jury had found the master's conduct barratrous upon these facts it would not have been competent under the authorities to have disturbed such a finding. While I suppose it would be competent for us under the power which the parties have consented we shall exercise, to draw inferences against such a conclusion, I do not think it is our duty to do so even although affirmatively we might have found otherwise. The production of the mate as a witness for the purpose of establishing such an issue could only be consistent with a successful defence by showing collusion on the part of the owner, and the circumstances of the trial indicate such a line of defence. There was correspondence between the owner and the master at Glasgow Harbor by telegram. Their despatches were called for by the defence and produced by plaintiff on the trial, but the defendant failed to give them in evidence. It is not necessary to suggest a motive for misconduct in the captain. There can be no doubt that, even if the reluctance of the master to navigate dangerous waters in an unsafe vessel at a stormy season created indifference in reaching the port of repair at Hawkesbury and resulted in the loss, that conduct, if promoted by the insured owners, would discharge underwriters. There is no evidence whatever upon which a jury could impeach the owner. If there is no reasonable explanation of the master's conduct consistent with his duty on and after the night of the stranding except that which arises from the mate's evidence, unworthy as he might otherwise appear as a witness, then I think there was a question which plaintiff might have had determined in his favor by the jury, and the judge could not, I think, notwithstanding the case in *Foster & Finlason's* report cited to me

when the jury were about to be sworn, have withdrawn it from them.

By the law of England, as appears from what has been said, this at least is our opinion:—

1. Where loss is occasioned proximately by the perils insured against, misconduct and negligence (not barratrous) of master or crew are not to be admitted as affording a defence to the underwriters.

2. The rule divesting the right of abandonment extends only to the condition of the thing insured at the time of action and not to the time of trial, and is wholly inapplicable to a vessel abroad repaired by purchaser at defective sale and restored to the sea after action.

3. To establish a constructive total loss it is not necessary that evidence of the value of probable repairs by procuring and producing a survey should be furnished on the trial.

We take occasion to state the propositions on the questions arising in this case thus distinctly in consequence of what appears in some manuscript copies of opinions in *Providence-Washington Insurance Co. v. Corbett*, of three of the learned members of the Supreme Court of Canada, which were furnished to us at the argument and relied on by defendant.

We have, I think, no means of officially informing ourselves upon what state of facts cases appealed from this tribunal are submitted to the court above. There may be a different case altogether. To say that we are concluded by that Court of Appeal, (unless of course there is authority from the Judicial Committee of the Privy Council,) is not definite. "I quite admit," said THESIGER, L. J., *3 C. P. D.*, at p. 484, "that this Court is equally bound by any principle of law clearly enunciated by the House of Lords, and treated by them as the basis of their decision, but admitting that to the full what is the principle which is to be collected from that case."

So much did *Corbett v. Providence Insurance Co.* when here resemble this case that we awaited the result of the appeal. Both were cases of coasting vessels stranded on a dangerous coast in the worst season, exposed to the gales of

the ocean, more than likely at any moment to be dashed to pieces before the impending storm. Both were cases where the master was not free from the imputation of misconduct and negligence; both were cases where the right of abandonment accrued; both were cases where the owners, mortgagees and underwriters were within call; both were cases where justifiable sales were insisted on, and where in neither case, from the same defect, did the sale seem to be valid; both were cases where notice of abandonment was unquestioned; both were cases where the neglect to use sampson posts and other appliances was urged as fatal, and where there was evidence to show the posts would be useless; both were cases where the place of stranding was some miles from a shire-town and place of repair; both were cases where restoration to the sea was relied on to divest the right of abandonment; both were cases where evidence of repair previous to action was wanting; both were cases where everything turned upon the evidence, and where the Court had power to draw inferences of fact, and though one case was for insurance on freight and the other on ship, that, as frequently happens, and as so far undisputed, is immaterial. We expected, therefore, an authoritative decision which would save us further trouble of independent exercise of judgment.

It is not the practice of that distinguished Court any more than it is of the House of Lords to embrace the conclusion arrived at in one deliverance as in the Privy Council, whose judgments are transmitted at once to the Court below, a practice, however convenient, we in this Court at least, and where our judgments are on appealed cases and final, can understand is not easy of adoption. To show that we are still left to the exercise of our own judgment, it is only necessary to say that we are not aware of any one principle adopted by the majority, and further, we cannot but suppose that the argument went upon different facts altogether from those upon which the decision below was made.

Corbett's case was argued here on the evidence now on file. The vessel was stranded while attempting to enter the harbor, and was wedged between the rocks in the winter. The harbor was frozen up for over four miles from the town. The evidence is uncontradicted that the stranded vessel was

exposed from the west all round to the south-east. There where she was sold she was liable to go to pieces at any moment. Wrecks were not unfrequent there, but few or none had ever been saved. The master swore:—"If the gale continued or other gales came on, she would have gone to pieces." Another witness speaking of getting her off, said, "If they had not succeeded then they never could get her off, as a heavy storm came on the next day." Another witness swears that when floated off by empty casks after the sale, she had not been removed more than a mile in her crippled condition before a snow-storm came on the shore, which would have broken her up. William Armstrong, a witness called for the defence said, "I believe the storm would have smashed her up the day after they got her off if she were there." The evidence before this Court was on this point entirely uncontradicted, and this fact was not questioned.

One of the learned Judges who discussed the case, in a carefully prepared opinion, distinctly says, "the vessel was ashore * * * within the harbor of Shelburne," and he seems to base his judgment to some extent on evidence of an Italian barque being within the harbor also, and available to rescue the stranded vessel, while the evidence on file upon which the case was argued here shows that she was outside, off the mouth of the harbor herself and one might well conclude, if covered by a policy, would not meddle in prohibited waters in any attempt to rescue the *Janie R.*,—the insured vessel. Nothing appearing to the contrary, we are to assume, I think, the rest of the Court were dealing with the same supposed facts. Indeed we cannot have a doubt of this upon reading the opinion of another learned Judge, who, however, is reported to have delivered an oral judgment, and who may have adopted the statement contained in the written opinion. He says, (as reported) of the insured vessel: "She was in the harbor when she was sold. There is no evidence of sufficient justification * * * on the grounds that the vessel was likely to go to pieces. She was in the harbor, and although it is possible she might have been injured by a storm, there is nothing to show she would have been totally destroyed if she had remained there all the winter."

There are no doubt in the opinions deciding *Providence-Washington Insurance Co. v. Corbett*, on appeal, dicta at variance with the propositions stated. I think some of them must be qualified by a supposed state of facts which distinguish it from the case under consideration.

It is true that two of the learned Judges in that case seem to think that by the mere neglect of a duty incumbent on the master, the owner may be deprived of an otherwise valid right of abandonment, or at any rate that we are to consider, in estimating the damage, whether it is in any degree due to neglect of duty, and if so weigh that in some manner to the prejudice of the assured and that such breach of duty is to operate to the detriment of the assured and in favor of the underwriter.

STRONG, J., says:—"First, it is clear that there is no right in a case of stranding to abandon to the underwriters until all reasonable means within his power have been used by the master for the recovery of the vessel. In *Parsons on Insurance*, vol. 2, p. 18, the rule on this subject is thus stated:—'It is quite certain, however, that neither stranding nor submerging, nor any loss that leaves the probability of recovery, gives of itself at once and necessarily the right to abandon, for it is the duty of the master to examine sedulously, and use to the best of his skill and power, all means for recovery, and there is no right to abandon until these means are used, or until it is obvious from the nature of the loss or the circumstances attending it, that there is but little if any hope of success.' Can it be said that the master, in the present case, complied with these essential requirements before notice of abandonment was given."

GWYNNE, J., says the same thing and we cannot escape the force of their opinions on the ground that they are not dealing with the question now before us, because both Judges are dealing with the right of abandonment irrespective of a justifiable sale, which subject both these learned Judges deal with separately.

If I for one understood that such was the spirit and intention of the judgment of the Court in that case, though unable to so understand the law, I should, notwithstanding, cheerfully apply it in this case, but these learned Judges may be alone

for aught we know in that view, and moreover, they seem to rely on the absence of evidence of damage. They say there was no evidence whatever, and though that may convince us that the real facts were not brought to the attention of the Court above, it can have no weight whatever in inducing us to disturb this verdict. .

The insured vessel in that case was stranded on the 15th February, and sold and taken off by the purchaser two or three days afterwards. At that time the Harbor of Shelburne was frozen up for the winter, and the vessel was repaired at a ship-yard in the town. The action in that case was commenced June 10th.

An independent ground for the decision is presented in one of the opinions handed to us. Assuming the defeasible abandonment good, it is pronounced divested by restoration after the stranding. We cannot understand from anything in that opinion at what period the right became divested, whether it was the moment the wrecked vessel was put afloat or whether remaining longer suspended it was lost to the assured after the repairs had taken place. The last account we had of the situation of the *Janie R.* before the date of action in the evidence upon which my brother McDONALD gave his verdict, she appeared buoyed up by empty casks outside the Harbor of Shelburne on an exposed and dangerous coast on the eve of a snow-storm and rising gale sufficient to dash her to pieces, in tow of an American vessel, a position of peril which would at that moment have justified an abandonment if it had not already accrued, and though this may be the period relied on in what is called in the judgment the defendant's *factum*, we are in the dark as already suggested, as to what appears in the "case" upon which the argument proceeded in the Court of Appeal. If by that case the learned Judges were led to suppose that the insured vessel was stranded and sold at the shipyard in the town where she was repaired, the authority has no application here, whatever may appear on the *factum* which we understand to be a mere *ex parte* proceeding in the appeal.

On the subject of barratry nothing appears in any of the learned opinions except the statement by one of the Judges

that the master neglected his vessel by going at once to the town of Shelburne to procure surveyors, with the apparent intention of having the vessel condemned, which would, we suppose, if so found, be barratrous and entitle the plaintiff to succeed.

Under the circumstances we must decide this case upon the English authorities, and our judgment is therefore for the plaintiff. The rule *nisi* must be discharged with costs.

OAKES v. KEATING ET AL.

Before SMITH, JAMES, and WEATHERBE, J J.

(Decided December 15th, 1883.)

Voluntary non-suit.—Libel.—Evidence.

On a motion for non-suit the learned Judge expressed the opinion that the plaintiff's evidence was extremely weak, but did not suggest that there was nothing for the jury. The plaintiff's counsel having thereupon offered to be become non-suit if with leave to set it aside, which leave was given.

Held, that the non-suit was voluntary and could not be disturbed.

A general charge of foreswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings, the case is different.

Where a writing was referred to in an alleged libel,

Semble, that the writing should have been produced, or its contents proved where its non-production was accounted for.

This was an action for maliciously writing and publishing of the plaintiff, a declaration that certain statements made by him in the course of evidence given in a previous suit were wholly untrue, the innuendo being that the plaintiff was guilty of the crime of wilful and corrupt perjury. The cause was tried before McDONALD, J. at Halifax, April 25th, 1882. At the conclusion of the plaintiff's case a motion was made for non-suit. The learned Judge expressed the opinion that the evidence was extremely weak as against Keating and Forsyth, as well as against the other defendants. The plaintiff's counsel thereupon said that in deference to the opinion so expressed, the plaintiff would become non-suit, if with leave to move to set the non-suit aside, which the learned Judge gave. A rule was taken accordingly.

Graham, Q. C.—This is a case where the party having assented to the non-suit cannot move against it. The Judge expressed an opinion that the evidence was exceedingly weak of publication of the libel, and plaintiff's counsel asked for a non-suit with leave to move; *14 C. B.*, 644; *3 U. C. Q. B.*, p. 333. The evidence would have been submitted to the jury. Cites *Smith v. McDonald*, 1 R. & G., 245. In *Domville v. Davies* the Judge expressed an opinion on the law. (WEATHERBE, J.—*Smith v. McDonald* is no authority. There was no argument in it.) I do not rely upon it. The line of distinction is between cases of law and fact. (*Sedgewick, Q. C.*—There was distinct evidence of the publication of the libel. WEATHERBE, J.—There is no note that the original was called for. *Sedgewick, Q. C.*—The Judge has ruled that it was not produced or accounted for. That shows that it was called for. Proof of a letter of which the libel is a copy, signed by the party, is proof of publication.

Sedgewick, Q. C., in support of rule.—This is one of the cases in which counsel was justified, in deference to the opinion of the Judge, in becoming non-suit, with leave to move. (WEATHERBE, J.—The Judge did not say that you ought to become non-suit, but that your evidence was weak.) The Judge did not mean that. The proof of publication was clear, but the Judge doubted if it was defamatory. If the Court is of opinion that this is not a gross libel we cannot succeed. If it is such in the opinion of the Court, we are entitled to have the non-suit set aside. We could not prove that the document was signed by Power or Graham, and had to let judgment go in their favor. The signatures of Forsyth and Keating were proved.

WEATHERBE, J., (December 15th, 1883,) delivered judgment as follows:—

This was an action of defamation against four defendants for joint publication, and after the plaintiff's evidence was in and he rested, defendant's counsel moved for non-suit. Plaintiff's counsel, during the motion, agreed to a verdict against his client, by two of the defendants, and the defendant's counsel continued to press his motion in favor of the other two defendants. The learned Judge having expressed an opinion

that the plaintiff's evidence was extremely weak, his counsel offered to become non-suited, with leave to move. Upon this point I understand the contention of plaintiff to be that there ought to be a new trial if we think,—although we may be of opinion that the learned Judge's view of the evidence was quite correct,—there was any evidence at all to submit to the jury. The learned Judge did not suggest there was nothing for the jury, and the most that can be said of his remark was that he intimated a strong view as regards the character of the evidence, which it may be, if the case had proceeded, he would have expressed to the jury, as the cases shew he had a perfect right to do. I know of no case where, upon a ground such as this, a new trial has been granted. Even where the Judge, at the trial, has been wrong in the view he expressed at the trial on a question of law and the plaintiff's counsel has acquiesced in a non-suit, leave has been refused to disturb it, and where it has been clear that the case should have been submitted to the jury, the Court has refused to set aside a non-suit unless the plaintiff had required the case to go to the jury; *Kindred v. Bagg*, 1 Taunt., 10. The Judge had not expressed an opinion on the law of this case at all. All he said about the evidence he would have had a right to tell the jury; *Attorney-General v. Good*, McL. & Y., p. 285, and the Court would not for that reason alone interfere. Moreover, in this case plaintiff's counsel, if he had chosen to comment upon the evidence, might have induced the Judge to take a more favorable view. From what the Judge said it is obvious he intended to leave the case to the jury. If counsel, in the course of the trial, out of deference to the Judge, submits to a ruling of the judge or an opinion expressed upon the law which turns out to be wrong, a new trial may be obtained; *Alexander v. Barker*, 2 Crom. & Jer., 133; but I have never understood that where, in consequence of comments by the Judge on the facts within the proper discretion of the Judge, and which, indeed, a Judge is bound to express if the case goes to a jury, a non-suit has been acquiesced in that it can be disturbed. For what purpose has the case been withdrawn from the jury? To invoke our opinion as to whether the Judge was right as to his view of the evidence? The most that can be contended, I should say, is that if in

the opinion of the Court the Judge's view was correct, the non-suit should stand. But that is a matter that has never been reserved for the Court. I am of opinion that this case is clearly within the opinion of the Court in *Simpson v. Clayton*, 2 Bing., N. C., 468. No doubt the learned counsel acquiesced in deference to the expressed opinion of the Judge, and he had leave to move; but there are two elements wanting to entitle him to prevail: 1st, the opinion was not upon a matter of law, and, 2nd, it is not for us to say that it was a wrong opinion. We must assume that he intended to leave the question open to the jury with proper comments upon the evidence. It does not follow, from what has been expressed, that he should not have pointed out that the weight of evidence was for the jury more than for the Judge, and that because he thought it was weak they were at liberty to regard it as the reverse. That was all for the learned Judge in the exercise of his discretion, and the Court will not understand that the jury were to be misdirected. In *Simpson v. Clayton* the judge had commenced to sum up the case and strongly expressed a view of the evidence unfavorable to the plaintiff, when counsel, after interposing without effect to obtain a more favorable direction from the judge, acquiesced in a non-suit in deference to the judge. A rule *nisi* was granted, as in this case, and after argument, TINDAL, C. J. laid down the general rule to be that where, in the progress of the trial, plaintiff's counsel withdraws the question of fact from the jury and submits to a non-suit, he cannot afterwards obtain a new trial. The exceptions to the rule are pointed out, namely, that if the presiding judge expresses a strong opinion there should be a non-suit, or gives the jury a wrong direction and plaintiff's counsel yields in deference to the judge, the Court will treat the plaintiff's case just as if the case had gone to an uninterrupted conclusion.

The Lord Chief Justice said:—"When the counsel for the plaintiff saw the jury were following the learned Judge in his observations on the effect of the evidence, I do not blame him for the discretion he exercised; but it was his own act, and he has no right to impose upon his opponent the expense of a double trial, because he feared the result of a verdict." What BOSANQUET, J. said in the same case is all very pertinent

here. There are two other grounds here, either of which, if sustainable, would be fatal to this application for a new trial. The first is that the allegations in the declaration have not been proved; and the second is that there is no proof of publication. Sifting out of the case all that is irrelevant, the words complained of as having been published by defendant of the plaintiff are substantially as follows:—

“In the suit of *Oakes v. The City of Halifax* we make this declaration:—We have read the printed evidence of the plaintiff, Oakes, taken before the arbitrators, lines 837 to 843.

* * * The statements contained in these lines are wholly untrue, so far as they refer to any offer or proposal, as therein stated, having been made to us. The said Oakes never, in our presence or hearing, proposed to give up his contract together with the materials or plant worth \$800 or \$100, or any sum, nor did he make any proposal or offer analogous in its nature to that he has sworn to in his said evidence. We are prepared to attest the truth of these statements whenever required.”

It is not pretended that plaintiff has proved what words were contained in the printed evidence referred to. The case cannot be put stronger than this for plaintiff; defendant falsely and maliciously wrote and published of plaintiff the words following:—“He did not make any offer analogous in its nature to that he has sworn to in his printed evidence as taken before the arbitrators.” Without any further evidence than publication of the above, without any proof of the printed evidence therein contained, or of the swearing of plaintiff before arbitrators, or of their authority to administer an oath; can an action be maintained on the ground that defendants have been proved to have imputed the crime of perjury to plaintiff.

A general charge of forswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings the case is different, and I have an impression, though it is not necessary to offer a decided opinion on this point, that the writing referred to in the alleged libel should have been produced, or its contents proved where its non-production was accounted for.

SMITH, J.—In this case I am of opinion the non-suit cannot be disturbed. At the conclusion of the plaintiff's case the learned Judge expressed an opinion, on an application by defendant's counsel for a non-suit, that the evidence was "extremely weak," when Mr. Sedgewick, "in deference to an opinion expressed," became non-suit, the Judge giving him leave to move to set aside the non-suit. It is somewhat difficult to see how we can enter upon a consideration of the plaintiff's case, where a non-suit has been voluntarily accepted, and the case withdrawn from the jury without a non-suit being directed by the Judge, or an intimation of the Judge's views upon the law being in any way expressed. The learned Judge does not say the evidence is insufficient in law, or that there are no facts to be left to a jury; he simply intimates that the evidence, in his opinion, is weak; and the plaintiff elects that that evidence shall not be submitted to a jury, and accepts a non-suit. In *Hughes v. The Great Western Railway Company*, the Judge who tried the cause said that the contract alleged in the declaration was not proved, and there was nothing to leave to a jury, and non-suited the plaintiff, the plaintiff's counsel making no objection. *Held*, that it was not competent to the plaintiff afterwards to move to set aside the non-suit on the ground of misdirection; and CRESSWELL, J. said, that if the Judge tells the plaintiff's counsel that he will non-suit him on a *point of law*, the latter does not by any mere acquiescence, lose his right to move; but if the Judge says he will non-suit the plaintiff, because there was no evidence to leave to the jury, the plaintiff's counsel, if he means to object, should insist upon going to the jury, or he cannot afterwards complain. In *Wilkinson v. Whalley*, 5 M. & G., 590, 592, ERSKINE, J. said, the distinction seems to be now that upon a misdirection in *point of law* the plaintiff may elect to be non-suited and afterwards move to set it aside, but not if the misdirection be upon the facts, such as the expression of a strong opinion on the part of the Judge. In *Butler v. Durant*, 3 Taunt., 229, tried before MANSFIELD, C. J., the learned Judge told the jury that the plaintiff not having distinctly proved any special damage, was entitled to nominal damages only, whereupon *Best* for plaintiff, elected to become non-suit, and upon a rule *nisi* to

set such non-suit aside, LAWRENCE, J. said: "His Lordship did not say you should be non-suited; he directed the jury that you should have nominal damages only; but you did not chose to trust your case with a jury. If there was a misdirection you should have abided the verdict, and then moved for a new trial." This case is cited by MCCAWLEY, J., in delivering his opinion in *McGrath v. Cox*, 3 U. C., Q. B., in which he says: "In the case before us the views of the learned Chief Justice were not communicated to the jury in summing up, but a discussion arose upon the plaintiff's counsel moving that a pamphlet should be read, which was objected to by defendant's counsel, and a non-suit moved for; but, certainly, as I understand it, the non-suit was the voluntarily act of the plaintiff's counsel; of course he could not have been non-suited without his own consent."

I think, in view of these cases and the current authorities on the subject, the non-suit cannot be disturbed, more especially as we concur in the view taken of the evidence by the learned Judge, and, therefore, the rule must be discharged with costs.

INDEX.

ABANDONMENT, NOTICE OF.

See INSURANCE, MARINE, 6.

ABSCONDING DEBTORS, ACT.

See RENT, LIEN FOR.

ADVANCEMENT.

The testator, desiring to invest money in the Savings' Bank and in Dominion five per cent stocks, ascertained that he could not invest more than \$1000 in the five per cents in his own name, nor more than \$10,000 in the four per cents. After investing up to the limit in both the four and five per cents in his own name, he withdrew part of the four per cents and purchased stock, for which he obtained certificates in his own name as trustee for his daughters and his wife, and also invested money in the four per cents in the same way. Separate pass-books were prepared for the moneys invested in the names of the daughters, on which their names were separately written by his direction. Before thus investing the money he learned, in answer to inquiries, that he would have full control of the money invested by him as a trustee. In entering the sums in his private book he mixed them all with his own money and passed the interest to his own credit. On one occasion, in mentioning to his wife the fact of these investments being made, he said he did not know how the money would stand and that he would have to see his solicitor about it; but the codicil, afterwards drawn up, made no mention of these moneys. These circumstances were relied on to rebut the presumption of an advancement. On the other hand he, on several occasions, told his wife that he had put such and such moneys in the Savings' Bank for Beatrice or for Dora, (the daughters,) and on one occasion, referring to a mortgage he was about to take up, he told his wife that he did not intend to touch her money or the children's, but to pay it off out of his own.

Held, reversing the decision of *RITCHIE, E. J.*, that the evidence given as to the circumstances under which the deposits were made did not rebut the presumption that the money was intended as an advancement to the children.

Jones et al. v. Kinnear et al. 1

ADVERSE ENJOYMENT.

See WATER COURSE.

ADVERSE POSSESSION TO DEFEAT CROWN GRANT.

In 1867 the Crown granted to one Scott a lot of land, of which defendant had been in adverse possession for ten years, and in 1870 Scott conveyed said land to defendant by deed, which was duly

recorded. In May, 1857, plaintiff recovered judgment, which was duly recorded, against Scott, under which the land in dispute was sold, and purchased by plaintiffs at the Sheriff's sale.

Held, that the adverse possession of defendant did not prevent the Crown from granting the land to Scott, as such possession, in order to have such effect, must be defined, actual and continuous for *twenty years*; and that, although Scott's deed to defendant was duly recorded, the land, although acquired after the judgment recorded in 1857, was bound by the judgment the moment it was granted to Scott.

Louisburg Land Company v. Tutty..... 401

AFFIDAVIT FOR APPEAL FROM JUSTICE.

See PRACTICE—Appeal from Justices' Court.

AFTER ACQUIRED PROPERTY.

See BILL OF SALE.

AGENCY.

See INSURANCE, MARINE, 6.

———— OF BANK HOLDING NOTE FOR COLLECTION.

See PRESENTATION FOR PAYMENT.

ALTERNATIVE, CONVICTION IN THE.

See CONVICTION.

APPEAL FROM COMMISSIONER OF MINES.

See MINING LAW.

———— FROM COUNTY COURT.

In an action of trover for deals the fact of conversion by defendant rested on evidence of the freight-deliverer that the deals were delivered to one McA., who acted as agent for defendant, as well as for DeW., to whom they were addressed by plaintiff; that it was his duty to know who were the charterers of the vessels being laden at the wharf where the deals were delivered, and that he knew that in this instance DeW. did not get the deals, but that McA. checked them from the cars and into vessels for the defendant.

Held, that the County Court Judge was right in refusing to non-suit the plaintiff.

Purdy v. Mathers..... 398

See also PRACTICE.

———— FROM JUSTICE OF THE PEACE.

See PRACTICE—Appeal from Justices' Court.

APPLICATION FOR MINING AREAS.

See MINING LAW.

BANK, ACTION FOR CALLS.

See CALLS, ACTION FOR.

BANK STOCK, TRANSFER OF.

See CALLS, ACTION FOR.

BANKRUPTCY AND INSOLVENCY.

See BRITISH NORTH AMERICA ACT.

See also INSOLVENT ACT OF 1869.

BILL OF SALE OF AFTER ACQUIRED PROPERTY.

Plaintiff replevied from the Sheriff of Halifax County property seized under execution as the property of one Baldwin, and claimed title thereto under certain bills of sale containing provisions that made the conveyance applicable to after acquired property. The goods were all ordered by Baldwin after the date of the bills of sale, and nothing had been done by plaintiff by way of asserting a right of possession.

Held, that, in the absence of any *novus actus interveniens*, plaintiff had not the legal title, and that he could not, in this suit, rely on an equitable title.

O'Keefe v. Bell 419

BOARD OF HEALTH.

See PUBLIC AGENTS.

BRITISH NORTH AMERICA ACT.

Under the provisions of the Act of the Legislature of Nova Scotia, chapter 104 of 1874, "to facilitate arrangements between Railway Companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B. debenture stock of the company then bearing interest at the rate of 6 per cent was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted.

Held, that so much of the Act of 1874 as was necessary to the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia.

WEATHERS, J., dissenting from the judgment of the majority, held that the proposed scheme could not be confirmed, chiefly on the ground that the undertaking of the company extended beyond the limits of the Province.

Re Windsor & Annapolis Railway 312

BURDEN OF PROOF.

In an action for an assault, the defendant pleaded *son assault demesne*, and, there being evidence on both sides, the jury found for defendant.

Held, that on appeal from a decision refusing a rule *nisi*, the plaintiff could not rely on an alleged misdirection by the Judge in not instructing the jury that the burden of proof of the prior assault was on the defendant, in view of the fact that after minute instructions the jury had believed the evidence of the defendant's witnesses, to do which they must have come to the conclusion, not that the evidence was evenly balanced, but that the evidence on the part of the defendant preponderated.

Per THOMPSON, J., where there is testimony on both sides of a case the decision is to be governed by the weight of evidence, and not by the legal doctrine about burden of proof.

Andrews v. Landers 236

BY-LAW MUST BE SET OUT IN CONVICTION.

See PRACTICE—Conviction.

CALLS, ACTION FOR.

1. To an action for calls on stock held by defendant in the Bank of Liverpool, defendants pleaded an equitable plea, setting up that before said calls were made or notice thereof given, the defendant had made, in good faith and for valid consideration, a transfer of the stock to a person competent and authorized to receive the same, and the defendant and said transferee had done all things necessary for the valid and effectual transfer of said stock, but the plaintiff, without reasonable excuse, had refused to record the transfer, &c. The shares were sold by defendant in October, 1877, to Almon & Mackintosh, and a power of attorney given by defendant to the manager of the Bank authorizing him to transfer the shares, and the stock certificates, together with the power of attorney, were delivered to Almon & Mackintosh who transmitted them to the manager with a letter referring to the enclosure and adding, "If you cannot complete transfer please note enclosed and hold until you decide to do so, * * * you can consider us as holders of the stock." The shares were not transferred on the books of the Bank, and the directors did not accept or recognize the transfer, but refused to record it. Some years before the attempted transfer the Bank had suspended specie payments, and it became a question whether the Bank should be wound up. At a special meeting a resolution was passed that the Bank should not go into liquidation and that the shareholders agree to hold their shares without assigning them until the principal and interest due on a loan for which the resolution provided should be paid. This resolution was communicated to the defendant, and defendant became bound to one of the sureties for the loan, for a proportionate amount of the liability. Defendant swore that he had heard of the resolution, but was not aware of its precise nature. The loan was not repaid at the time of the alleged transfer, but defendant had been released from his bond.

Held, that the defendant was liable for the calls sued for.

JAMES, J., dissenting.

Bank of Nova Scotia, Assignee of the Bank of Liverpool v. Smith.... 146

2. An action was brought by the plaintiff Bank as assignee, under the Insolvent Act of 1875, of the Bank of Liverpool, against the defendant, for a call of 100 per cent on his stock in the said Bank of Liverpool. The only evidence of the making of the call was a notice published in the *Gazette* of the 17th of January and following issues, as well as in the local papers dated the 10th of January, by which a number of calls were made, payable at intervals.

Held, that the calls could not all be legally made at one time, and none could legally be made but within ten days after the expiration of six months from the suspension of payment by the bank. And further, that in computing the statutory intervals between calls the time must be reckoned exclusively of the day on which the previous call was payable.

Per WEATHERBE, J., that the insolvency of the Liverpool Bank and the insufficiency of assets should have been alleged, and further, that a certificate of the County Court Judge, after the alleged making and notice of the calls, approving of the plaintiff bank so acting through their cashier, was not a sufficient compliance with section 6, chapter 31, 39 Victoria.

Per McDONALD, J., that the declaration was sufficient, but the calls were irregular for the reasons above stated.

Bank of Nova Scotia, Assignee, v. Forbes.... 295

INDEX.

v

CERTIORARI.

See PRACTICE—Certiorari.

CLAIM, SCHEDULE OF.

See INSOLVENT ACT OF 1869.

COMMISSIONER, JURISDICTION TO ALLOW CERTIORARI.

See PRACTICE—Certiorari.

COMMISSIONER OF WORKS AND MINES, PROPERTY VESTED IN.

See OFFICERS OF THE CROWN, action against.

COMPOSITION AND DISCHARGE.

See INSOLVENT ACT OF 1869.

CONDITION IN GRANT, NON-PERFORMANCE OF.

See FORFEITURE OF GRANT.

CONSTRUCTIVE TOTAL LOSS.

See INSURANCE, MARINE. 1, 6, 7.

CONTRACT BY PUBLIC AGENTS.

See PUBLIC AGENTS.

CONTRIBUTION BY CO-SURETY.

Surety held not liable for contribution, where there was no liability shown on which money should have been paid by the co-surety.

Carney v. Phalen 126

CONTROVERTED ELECTION.

See PRACTICE.—Res adjudicata.

CONVICTION.

Plaintiff was charged before the Stipendiary Magistrate for the City of Halifax with lewd conduct and keeping a room or house for prostitution, and was fined \$50, and, in the event of non-payment, ordered to be imprisoned two months. There was evidence that the magistrate ordered him into custody, where he remained till the fine was paid, but this was not put to the jury.

Held, by McDONALD, C. J., and McDONALD, J., that the magistrate was not liable to an action for false imprisonment.

By RIGBY and SMITH, J J., that the conviction in the alternative was bad, and the imprisonment thereunder unlawful.

Marter v. Pryor 498

CO-PARTNER, SUIT BY.

See PARTNER.

COSTS.

Where the respondent succeeded on appeal, but there appeared to have been some irregularity on his part in the proceedings below the extent and importance of which were uncertain, costs were not allowed.

Mahon v. Gammon..... 232

— ON APPEAL FROM COUNTY COURT.

Appeal from the judgment of the County Court allowed, on the evidence, with costs, and judgment to be entered for plaintiff below with costs.

Millet v. Lordly..... 309

— ON APPEAL FROM PROBATE COURT.

Appeal from the Judge of Probate having been dismissed, costs were withheld because the Judge improperly condemned the party who appealed in costs as to the contestation below. *In re Simpson*, 3 R. & C. 357, and *In re Heffernan*, 3 R. & C. 386, distinguished.

Re Est. W. McKilligan..... 406

COUNTY COURT, APPEAL FROM.

See PRACTICE—Appeal from County Court.

COUNTY INCORPORATION ACT.

See MUNICIPAL ELECTION.

CROWN GRANT, ADVERSE POSSESSION TO DEFEAT.

See ADVERSE POSSESSION.

CROWN PROPERTY, TRESPASSES TO.

Plaintiff applied for a grant of Crown Land and while the application was pending defendant illegally cut a number of logs on the land and removed them. The logs were seized by a Crown surveyor under section 3 of chapter 12, R. S., (4th Series), and were afterwards driven to the defendant's mill and sawn up. Plaintiff, having first demanded the logs, brought trover for them and obtained judgment in the County Court.

Held, that the Crown was not limited to the condemnation proceedings set out in chapter 12 R. S., (4th Series), as the chapter did not expressly take away its existing remedies, but that, as there was no evidence that the plaintiff had ever had possession of the logs the appeal must be allowed.

Mongan v. Rice..... 368

DEDICATION OF WATER COURSE.

See WATER COURSE.

DELAY, ACCOUNTING FOR.

See PRACTICE—Opening judgment.

DELIVERY IN SATISFACTORY CONDITION.

See SALE OF GOODS.

DEMURRER TO GROUNDS OF DEFENCE NOT ALLOWED.

See PRACTICE, Demurrer, &c.

DEVIATION.

See INSURANCE, MARINE, 3, 6.

DISCHARGE IN INSOLVENCY.

See INSOLVENT ACT OF 1869, 1.

EASTERN EXTENSION RAILWAY ACT.

Plaintiff set out in his declaration an agreement between one Harry Abbott and the Government of Nova Scotia for the construction and equipment of the so-called Eastern Extension Railway from New Glasgow to the Strait of Canso, a transfer of Abbott's interest in said contract to the Halifax and Cape Breton Railway and Coal Company, a contract between the company last mentioned and the Canada Improvement Company, by which the latter were to construct and equip the road, and a contract between said Canada Improvement Company and the plaintiff, under which the plaintiff was to construct and equip the road, receiving, as the work progressed, payment in cash and bonds of the Halifax and Cape Breton Railway and Coal Company, as in the agreement set forth. The declaration then set out a series of transactions, including a suit by the plaintiff to recover damages for alleged breach of the agreement made by him for the construction of the road, and a final compromise and settlement embodied in the agreement upon which the present action was brought. By this agreement the Canada Improvement Company contracted to deliver to plaintiff, so soon as the same could legally be issued, (to which end the two companies,—both being parties to the agreement and defendants in the action,—covenanted to use every diligence,) eighty thousand dollars in good, sufficient and available first mortgage bonds of said Halifax and Cape Breton Railway and Coal Company, which should be a first lien on the Pictou Branch,—to be handed over by the Dominion Government in aid of the construction,—on the Eastern Extension, and also on the said Halifax and Cape Breton Railway and Coal Company and the property mentioned in the company's act of incorporation. The Halifax and Cape Breton Railway and Coal Company also covenanted for the handing over of said bonds by the Canada Improvement Company at the time and manner and of the character and description stipulated. The agreement contained covenants and conditions on the part of plaintiff as to the performance of which there was no dispute. The breaches alleged were that the defendants failed to deliver the bonds as stipulated, that they did not use due diligence as stipulated, and that they had entered into agreements and sought and procured legislation which rendered it impossible for them to hand over bonds of the character stipulated. Defendants relied on one of the statutes so procured, namely, the Act of the Legislature of Nova Scotia, chap. 66 of 1879.

Held, that the Act afforded no defence to the plaintiff's action for damages for the non-fulfilment of the agreement.

After pleading to the declaration, defendants added pleas as to one half the amount of the mortgage bonds claimed, setting out, in different forms, that plaintiff had assigned the same to the Government of Nova Scotia, and given Hon. P. C. Hill, then Provincial Secretary, authority to receive them, and that the Canada Improvement Company had accepted the order and become bound to deliver said bonds to the Government of Nova Scotia, and that the suit was not brought on behalf of the said Government, or with their consent.

Plaintiff replied, denying the fact of the assignment, alleging that there was no consideration, and that the assignment was made subject to a condition that there should be no legislation by the Legislature of Nova Scotia adverse to the interests of the plaintiff, which condition was violated. The Court, having power under the rule to determine the fact, found that the plaintiff's version of the agreement to assign was sustained by the evidence, and gave judgment for the plaintiff, adding,—under the power given in the rule to increase the verdict,—interest from the date of the agreement between defendants and the Government which resulted in the legislation under which it became impossible to perform the covenant to deliver the bonds.

Gregory v. The Halifax and Cape Breton Railway and Coal Co .. 436

EJECTMENT.

1. Verdict for defendant in ejectment upheld where there was no evidence to identify the land in plaintiffs' deed with that in dispute.
Wood v. Smith 37

2. In an action of ejectment, the jury, in answer to a question put to them by the Judge, found that plaintiff, in selling the lots one of which defendant purchased, announced that the colored places on the plan, one of which was the locus, were streets.

Held, that the presumption that defendant held *ad medium flum* *via* was rebuttable by proof of the title being in plaintiff, and that, under the description in defendant's deed designating the land, as indicated on the plan, and specifying the dimensions, which were such as not to include the street, the title to the street or any part of it, did not pass to defendant.

Defendants, at the argument, relied on a title by possession, but their pleadings set up only a documentary title, and the evidence of title by possession was not submitted to the jury.

Held, that the verdict for defendant could not be sustained by showing that, under the evidence, defendant had acquired title by possession.

Ernst v. Waterman 272

See also OFFICERS OF THE CROWN.

EVICION, ACTS CONSTITUTING.

In an action for rent of land of which the defendant entered into possession under a tender made to Her Majesty's Principal Secretary of State for War, defendant contended that he had been evicted, first by a lease made of part of the premises to the Directors of Point Pleasant Park and by permission given by the Colonel of the Engineers to the French Cable Co. to erect a building on part of the demised premises. The lease referred to was made subject to existing leases, and it did not appear that the Colonel of the Engineers had authority to give the permission complained of. Accordingly the judgment of the County Court was for plaintiff.

Held, that the judgment was rightly given for plaintiff on the grounds taken, and that it was too late on appeal to take the ground not taken in the Court below that the action should have been in the name of the Secretary of War as plaintiff.

The Queen v. Miller 361

EVIDENCE.

Defendant sought to set aside a verdict for plaintiffs in an action of trespass for cutting and removing the plaintiff's wharf, on the ground that a plan offered by defendant, which was admitted to have come from the Crown Land Office and was signed by the

Surveyor-General, but was proved in no other way, had been rejected. There was no evidence before the Court, and, assuming that the plan could be received for that purpose, there was none on the face of the plan, to connect it with the title of any of the parties to the suit.

Held, that the plan was properly rejected.

Essex et al. v. Wood..... 276

See also ADVANCEMENT.

“EXECUTION,” MEANING OF IN R. S., cap. 107, s. 7.

See RENT, LIEN FOR.

FALSE IMPRISONMENT.

1. Defendant ordered plaintiff off his wharf and sent for a policeman, who came and took the plaintiff to the lock-up where he placed him in a cell.

Held, that defendant had a right to have him removed from the wharf, and was not responsible for the subsequent arrest and imprisonment.

Hubley v. Boak..... 82

2. The master of a steamer lying in Halifax Harbor, having cause to suspect plaintiff of stealing, and having procured warrants to be issued against him, confined the plaintiff while the search was being made, in order to prevent him from communicating with the rest of the crew. An action for false imprisonment was brought.

Held, that the master had acted within the scope of his authority.

Leith v. Trott..... 129

3. Plaintiff was charged before the Stipendiary Magistrate for the City of Halifax with lewd conduct and keeping a room or house for prostitution, and was fined \$50, and, in event of non-payment, ordered to be imprisoned two months. There was evidence that the magistrate ordered him into custody, where he remained till the fine was paid, but this was not put to the jury.

Held, by McDONALD, C. J., and McDONALD, J., that the magistrate was not liable to an action for false imprisonment.

By RIGBY and SMITH, J. J., that the conviction in the alternative was bad, and the imprisonment thereunder unlawful.

Marter v. Pryor..... 498

FISHING VOYAGE, SALE OF INTEREST IN.

Plaintiff levied upon the interest of sharemen in fish secured as the result of a fishing voyage, and purchased the said interest at the sale. Defendants, having sold the fish under a bill of sale, which was found by the County Court to be fraudulent,

Held, that plaintiff could recover nothing from defendant under the common counts, as the most that he was entitled to under his purchase was an accounting.

Collie v. Bell..... 134

FORFEITURE OF GRANT.

The Crown sought to forfeit two grants for non-performance of conditions as to improvement, &c., but none of the evidence on which the Crown relied went further back than fifty years, while the grants were ninety years old.

Held, that the evidence was not sufficient to forfeit the grants.

The Queen v. Robin et al...... 91

FORFEITURE OF LEASE.

Plaintiff made a lease for lives. The lessee conveyed to the defendant in fee simple and afterwards assigned to him the lease. Defendant paid rent to the plaintiff both before and after action of ejectment brought by plaintiff. In this action plaintiff relied on the forfeiture of the lease by the making of the deed in fee simple, but it appeared that plaintiff was not aware of this fact until after action brought. The Judge recommended a non-suit which was accordingly entered, but the Court set it aside as there was some evidence that plaintiff had treated defendant as a yearly tenant and not merely as holding under the lease.

Per JAMES, J., that the conveyance in fee did not create a forfeiture.

Berry v. Berry..... 66

FRAUDULENT CONVEYANCE.

Defendant applied to set aside a writ of attachment, levy and sheriff's return on the ground that the Court had no jurisdiction because the property attached was not that of the defendant, having been conveyed to a trustee in trust for his wife some time previously. Affidavits were read in reply to shew that the trust deed was made fraudulently and in contemplation of insolvency.

The rule was discharged with costs.

Thompson v. Ellis..... 307

FREIGHT, INSURANCE OF.

To an action for goods sold defendant pleaded that plaintiffs had taken in payment a draft drawn by the master on the consignees for freight, which draft plaintiffs had agreed to insure. The plaintiffs charged the premium to defendants but did not insure and the freight was lost. The County Court Judge found, on the evidence, that although defendants had intended plaintiffs to insure the draft, plaintiffs had never undertaken to do so and had not taken the draft in full satisfaction of the debt.

Appeal dismissed.

JAMES, J., dissenting, held that in charging the defendants with the premium plaintiff had led them to assume that the freight was insured.

Corbett et al. v. Stronach et al...... 169

GENERAL VERDICT, EFFECT OF.

See INSURANCE, MARINE, 1, 5.

IN COUNTY COURT.

Quære, whether juries, in cases in the County Courts, other than those mentioned in section 55 of the Act, should be instructed to give general verdicts, and whether the proper procedure is not to obtain their findings on the controverted facts which the Judge deems it proper to submit to them, after which the judgment in the cause should be given by the Judge irrespective of the jury.

Andrews v. Landers..... 236

GROUND OF DEFENCE NOT DEMURRABLE.

See PRACTICE—Demurrer.

HIGHWAY.

See WATER COURSE.

INNUENDO.

See LIBEL, 1, 3.

INSOLVENT ACT OF 1869.

1. Defendants were sued on a promissory note made to the solicitors of the plaintiff and by them endorsed to plaintiff. They pleaded a discharge under the Insolvent Act of 1869. Two of the defendants produced a supplementary list of creditors alleged to have been filed a few days before the date of the discharge, which list did not give the residence of the parties scheduled or state the nature of the debt or whether direct or indirect, but was simply a bald statement of names and amounts and it was not shown that any schedule to which it professed to be supplementary had ever been filed in the manner required by the act. The third defendant produced no schedule but stated that he had sent it to his solicitor to be filed. There was no proof that the solicitor had received it or that it had been filed; and, on secondary evidence being allowed, it was shown that the debt had been scheduled as due to the solicitors instead of being scheduled as due to plaintiff.

Held, that the discharge in insolvency did not release the claim.

Knaul v. Sponagle et al. 193

2. J. V. Gavaza was in partnership with three other Gavazas previous to 20th February, 1877, when he retired, and the others continued the business as T. A. Gavaza & Sons. On retiring he was to receive \$2,000, for \$1,750 of which he took the note of the new firm. Shortly afterwards all four were put into insolvency on debts of the old firm. J. V. Gavaza, although one of the insolvents, proved as a creditor on the note for \$1,750, and acted as a creditor in all the insolvency proceedings. The insolvents, on the 14th November, 1877, offered a compromise of 50 cents on the dollar, payable in 6, 12 and 18 months, and to be secured by the joint and several notes of the insolvents, and of Susan Marshall and T. W. Chesley. The offer was accepted and a deed of composition was made and confirmed. By the deed the four insolvents covenanted to pay the composition and to secure it by such notes, and the creditors released their claims and authorized the assignee to return the estate to the insolvents. The deed was dated 30th November, 1877. On 28th December, 1877, the four Gavazas joined in a request to the assignee to convey the estate to T. W. Chesley "to hold the same in trust to convert the same into money to meet the claims of our creditors on promissory notes signed by Mr. Chesley as our surety." In an action on one of the composition notes, made for part of the dividend on the claim of J. V. Gavaza for \$1,750, signed by the other three Gavazas and by Susan Marshall and Thomas W. Chesley, payable to the order of J. V. Gavaza, and by him indorsed to the plaintiffs after maturity;

Held, (McDONALD, C. J., dissenting,) that J. V. Gavaza being one of the insolvents, was not one of the creditors covenanted with, and therefore was not entitled to composition notes under the deed.

That although he might have had a right to rank in respect of the \$1,750 against the separate estates of his co-insolvents, he had relinquished such right by consenting to the transfer of the assets to Chesley.

That the notes to be signed by Marshall and Chesley were notes to the creditors of all the insolvents, and not notes from three of them to the other, and that Marshall and Chesley were only indemnified as to the former.

That J. V. Gavaza was not one of the creditors who released their claims by the deed.

That consequently there was no consideration for the note sued on, as to Marshall and Chesley.

That inasmuch as the note sued on had been delivered only to the assignee to satisfy a mistaken notion entertained by him that he was entitled to demand such notes, and with express instructions that he should not part with it, there was no delivery by the makers as a contract.

Held, also, that the weight of evidence established the defence that the claim of J. V. Gavaza for his dividend had been satisfied by another note in which one Bennett joined as surety.

Judgment of County Court reversed and judgment entered by defendants.

Stephen et al. v. Gavaza et al...... 514

INSURABLE INTEREST.

See INSURANCE, MARINE, 4, 5.

INSURANCE, MARINE.

1. In an action on a policy of insurance on potatoes, in which it was stipulated that they should be free from all average unless general, plaintiff obtained a general verdict by consent. The potatoes arrived at the port of destination damaged by sea water and very rotten, and evidence was received that they were worthless, and would not re-pay the expenses of taking them out of the vessel, yet 684 bushels were taken out, and, deducting charges for duties, custom house broker and commission, yielded net proceeds amounting to \$220.80. It was not shewn whether the cost of picking and sorting, &c., exceeded this sum or not.

Held, that, in view of the general verdict by consent, the Court must assume that the jury had found that the potatoes were worthless, as this was the only question for the jury, but that such finding was against the weight of evidence, as there was nothing to shew that the net proceeds realized were not clear of all expenses, and the burden was on the plaintiff to shew that there were expenses that exceeded said proceeds.

Almon v. British America Assurance Co...... 43

2. Plaintiff applied for a policy of marine insurance, stating in the application that the vessel was to coast principally from Canso to Halifax using P. E. Island and Newfoundland. The policy differed from the application, covering other risks than those applied for and containing exceptions not in the application. The vessel was lost on a voyage from Baltimore to St. Thomas, which was within the policy.

Held, that this was not a case of misrepresentation and that the insured was justified in sailing wherever the policy permitted.

Corbett v. McKenzie et al...... 50

3. A cargo of fish was insured at and from Eel Brook to Halifax. The vessel, after partly loading at Eel Brook, proceeded to Tusket Wedge, which was admittedly outside of Eel Brook, and to Morris Island, which was seven miles therefrom, and where she took in supplies. There was no evidence to show a usage that Morris Island was considered the same as Eel Brook.

Held, that there was a deviation.

Rodgers v. Jones...... 96

4. Plaintiff, being the mortgagee of a vessel, caused insurance to be effected to the sum of \$5,000 in defendants' office in addition to \$5,000 insured in the Anchor Marine Insurance Company. The amount due to the mortgagee was \$5,306, in addition to which he had advanced for payment of premiums \$522, making in all \$5,828. Plaintiff had received from the sale of the vessel \$1,207 and from the Anchor Marine Insurance Company \$4,493—in all \$5,700, leaving a balance of \$128. The verdict was for \$1,325, and plaintiff claimed

to retain it as trustee for the owner. The policy was expressed to be for "E. P. Archbold on account of himself." The only interest he set up in his affidavit of claim was as mortgagee, and the only authority he proved was that contained in his statement; "The owner authorized me to insure further for my own protection."

Held, that there must be a new trial unless the parties should consent to reduce the verdict to \$128.

Archbold v. The Merchants' Marine Insurance Company..... 98

5. Where insurance was effected on goods on a voyage from Halifax to Labrador and back to Halifax and in the "description of goods insured" the words were, "merchandize under deck, amount \$2000, rate 5 per cent; premium \$100, to return 2 per cent if risk ends 1st October and no loss claimed."

Held, that the risk could not be confined to goods shipped at Halifax.

The insurance was not taken "on behalf of whom it may concern" and it was contended that plaintiffs could not recover being only unpaid vendors, but it appeared that the plaintiffs had supplied the goods to one Tupper under a special agreement by which they were to have a special property in them.

Held, that they had an insurable interest, and that, after verdict for plaintiffs, it was not sufficient cause to set it aside that one of the plaintiffs, on cross-examination, had answered that if the goods had been lost without insurance the loss would have fallen on Tupper, such answer being rather the plaintiff's view of the legal effect of the agreement than a statement of the terms of the agreement as a matter of fact.

Rumsey et al v. The Merchants' Marine Insurance Company..... 220

6. Plaintiff applied to one Haley, who acted as a broker for the Shipowners' Association of Windsor, and also for the defendant company doing business at Halifax, for insurance on one-fourth interest in a vessel on a voyage from Cochin to New York via Colombo and Alipee. The broker replied that the "Shipowners' Marine" did not care for this risk, but he thought he could place her. Plaintiff wrote him, saying in substance:—"You may place insurance on *Charlie* at your figures. I think it should be done for three per cent, but do the best you can. Let me know as soon as possible." The broker then applied to the defendant company for insurance on plaintiff's vessel "*Cochin, Alipee and New York*," but the vessel sailed and was lost on a voyage from Cochin via Colombo and Alipee to New York.

Held, that the broker was the plaintiff's agent, and, inasmuch as the insurance he applied for was on a different voyage from that on which the vessel sailed and was lost, the plaintiff must fail.

Held further, that notice of abandonment was necessary, although the suit was brought, not on the policy of insurance, but for not issuing a policy.

Dickie v. Merchants' Marine Insurance Company..... 244

7. While on a voyage from Boston to St. Pierre, the vessel insured by the defendant Company mis-stayed and struck off Isle Madame. During the night the tide fell and the vessel was thrown over on her side and damaged. Surveyors recommended that she should be stripped and sold. This was done and the vessel realized \$140. The purchaser got her off and, after an expenditure of \$2000, more or less, including the price, ran her for two years, at the end of which time she was sold for \$1900; but at the time of action brought she was lying at Arichat Harbor (to which she had been taken) locked in ice and unrepaired. There was evidence of negligence and want of energy on the part of those in charge but not amounting to barratry.

The Court, having power to draw inferences of fact as a jury, sustained the finding of the Judge in favor of plaintiff as for a constructive total loss.

Almon et al. v. The Providence-Washington Insurance Co...... 533

INTEREST, INCLUDED IN VERDICT.

See Gregory v. Halifax & C. B. Railway Co...... 436

———, INSURABLE.

See INSURANCE, MARINE, 4, 5.

IRREGULARITY, EFFECT OF ON COSTS.

See COSTS, 1.

JOINT STOCK COMPANIES CLAUSES ACT.

See Gregory v. Halifax & C. B. Railway Co., 436.

JUDGMENT, LIEN OF ON AFTER ACQUIRED PROPERTY.

In 1867 the Crown granted to one Scott a lot of land, of which defendant had been in adverse possession for ten years, and in 1870 Scott conveyed said land to defendant by deed, which was duly recorded. In May, 1857, plaintiff recovered judgment, which was duly recorded, against Scott, under which the land in dispute was sold, and purchased by plaintiffs at the Sheriff's sale.

Held, that the adverse possession of defendant did not prevent the Crown from granting the land to Scott, as such possession, in order to have such effect, must be defined, actual and continuous for *twenty years*; and that, although Scott's deed to defendant was duly recorded, the land, although acquired after the judgment in 1857, was bound by the judgment the moment it was granted to Scott.

Louisburg Land Company v. Talty..... 401

JURISDICTION, PLEA TO.

See MEASURE OF DAMAGES.

JUS DISPONENDI.

See INSURANCE, MARINE, 5.

LANDLORD AND TENANT.

See RENT, LIEN FOR.

LIBEL, ACTION FOR.

1. The declaration set out that the defendant company falsely and maliciously printed and published of the plaintiff in relation to a certain office held by him as Deputy Provincial Secretary, in a certain newspaper, &c., and *which said article* appeared in the editorial columns of the *Morning Herald*, &c., and was as follows, viz., (the article being then set out at length.)

Held, that although no "article" had been mentioned in the count to which the words, "which said article," could refer, the defect was cured by pleading over and particularly by justifying the publication.

Held, further, that although the defamatory matter was charged as having been published of the plaintiff in relation to his office, it was no objection to the verdict for plaintiff that the fact of plaintiff holding such office was not proved, as some of the words used were actionable in themselves, and the innuendoes showed that the object of the suit was to recover damages sustained by plaintiff out of office by reason of charges made against him of alleged improper conduct while in office.

Held, also, that the evidence of publication (q. v.) was sufficient to go to the jury, and it was no misdirection to leave the question of publication to the jury under such evidence, and that the damages, (\$3000,) were not excessive, in view of the serious charges contained in the article and the subsequent conduct of the defendants.

Crosskill v. The Morning Herald Printing and Publishing Co...... 200

2. Defendant wrote to the Provincial Secretary a letter containing complaints and charges against the defendant in his office as sheriff. Defendant justified on the ground that, being a barrister of the Court and dissatisfied with the official conduct of the plaintiff he had written to said Provincial Secretary, being a member of the Government which had appointed and could dismiss the plaintiff, believing that the statements set forth in the letter were true; and he alleged that the letter was written without malice. Plaintiff new assigned publication to other persons, but the letter so published was not clearly identified with the one on which the action was brought. The jury found for defendant.

Held, that the communication to the Provincial Secretary was privileged.

Per SMITH, J.—That although the letter contained expressions that might indicate malice, as the jury had found for defendant, after the evidence on that point had been clearly put to them by the Judge, the verdict could not be set aside.

Per McDONALD and WEATHERBE, J. J.—That although the verdict was unsatisfactory there was not sufficient reason for disturbing it.

DesBarres v. Tremaine..... 215

3. Defendant admitted publication of an alleged libel, and denied that the alleged defamatory matter was published of and concerning the plaintiff with the sense set out in the innuendo.

Held, that it was the duty of the Judge to tell the jury whether the words used were capable of the construction put on them by plaintiff, and to leave it to the jury whether the words were in fact used with such meaning.

Held, further, that under the plea in which the defendant justified the publication as a legitimate criticism, the Judge should have told the jury whether or not the occasion created a privilege, and, if so, should have left it to the jury to say whether the defendant was actuated by malice in fact, which, if it existed, destroyed his privilege.

Ray v. Corbett..... 407

4. On a motion for non-suit the learned Judge expressed the opinion that the plaintiff's evidence was extremely weak, but did not suggest that there was nothing for the jury. The plaintiff's counsel having thereupon offered to become non-suit if with leave to set it aside, which leave was given,

Held, that the non-suit was voluntary and could not be disturbed.

A general charge of forswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings, the case is different.

Where a writing was referred to in an alleged libel,

Semble, that the writing should have been produced, or its contents proved where its non-production was accounted for.

Oakes v. Keating et al...... 554

LIEN OF JUDGMENT.

See JUDGMENT.

LIVERY OF SEISIN.

See per JAMES, J., in *Berry v. Berry*..... 72

LUNATIC, ACTION BY GUARDIAN.

See PRACTICE, LUNATIC, &c.

MARINE INSURANCE.

See INSURANCE.

MASTER OF SHIP, AUTHORITY OF.

See FALSE IMPRISONMENT, 2.

MEASURE OF DAMAGES IN TROVER.

Defendant was sued in the County Court in an action of trover for goods and pleaded that the goods alleged to have been converted were of the value of \$600 and upwards and the County Court had no jurisdiction. The plea was demurred to and held to be good by the County Court Judge, who was about proceeding to try the case when a rule *nisi* was taken at the instance of defendants for a writ of prohibition.

Held, that the plea was not a good plea, as the damages claimed were only \$200 and the measure of damages in trover was not necessarily the value of the goods; and that, the Court having jurisdiction, the writ of prohibition could not be granted.

O'Toole et al. v. Wallace et al...... 357

MINING AREAS, FORFEITURE OF.

See MINING LAW.

MINING LAW.

1. Proceedings were taken to forfeit certain gold mining areas, and the notice pursuant to statute was addressed to the defendant, who was the mortgagee and not the owner of the areas.

Held, that the Commissioner of Mines had no jurisdiction for want of notice to the owner.

The Queen v. Elze..... 130

2. After investigation before the Commissioner of Mines to determine which of a number of applicants for a lease was entitled, the Commissioner decided in favor of one O'Toole on the ground of priority. The several applicants were all present at the Mines Office on the morning on which the areas were presumed to be open for application, and, on the Market Clock commencing to strike, a struggle took place between them in the endeavour each to be the first to bring his application to the notice of the Commissioner. O'Toole had entered the area under a lease from Wallace the original lessee and the present appellant, but had claimed that the agreement between himself and Wallace had terminated sometime before the application. The lease was in writing and was not put in, and there was nothing to show that the proviso for terminating it was one of

which O'Toole could avail himself. The Commissioner in his decision intimated that he had nothing to do with this branch of the inquiry.

Held, that the Commissioner was wrong in deciding the matter on the mere question of priority, and should have considered the point that, as the holder of a chattel interest under Wallace, O'Toole could not lawfully do any act to defeat the title of his lessor; and, as this point had not been considered, the appeal must be sustained with costs.

Re Gold Mining Areas, Waverley..... 280

MINUTES OF JUDGE CONCLUSIVE.

See Halifax Banking Co. v. Worrall..... 482

MISDIRECTION AS TO BURDEN OF PROOF.

See BURDEN OF PROOF.

MISREPRESENTATION IN CONTRACT OF MARINE INSURANCE.

See INSURANCE, MARINE, 2, 6.

OF VOYAGE.

See INSURANCE, MARINE, 2, 6.

MISTAKE IN VERDICT.

See VERDICT RENDERED BY MISTAKE.

MONEY RECEIVED, ACTION FOR.

Plaintiffs, having recovered a judgment and issued an execution against the judgment debtors, were about bringing action against the defendant, (the Sheriff,) for negligence in the execution of the writ, whereupon defendant's attorneys, wrote plaintiffs asking permission to be allowed to issue an execution against the debtors, in order that the Sheriff "might be able to find sufficient property to save himself from loss." Plaintiffs gave the permission to defendant to issue the execution "on his own responsibility, and to be considered totally irrespective and apart from the suit we are now about to bring against the Sheriff." The execution was accordingly issued and \$200 collected, which the Sheriff declined to pay over until the suit for damages was determined. An action was brought for money had and received.

Held, that the verdict for defendant must be sustained.

Per WEATHERBE, J.—That under the correspondence the money collected was to be held for the purpose of indemnifying the defendant from loss in the proceedings to be taken against him, and that, until that matter was settled, plaintiffs were estopped from claiming the money so collected.

Bank of British North America v. Bell..... 121

See also PRINCIPAL AND AGENT.

MORTGAGEE OF MINING AREA, NOTICE TO.

See MINING LAW, 1.

MORTGAGEE'S INTEREST, INSURANCE OF.

See INSURANCE, MARINE, 4.

MUNICIPAL CORPORATION, LIABILITY OF.

See NUISANCE.

ELECTION.

A petition was presented to the County Court Judge against the election of respondent as a County Councillor, on the ground that he was disqualified from being a candidate by virtue of his office as Secretary to School Trustees, and, as such, a collector of school rates in his section.

Held, reversing the decision of the County Court Judge, that such an office was not within the disqualifications in sec. 7, cap. 1, Acts of 1881.

Holdsworth, Petitioner, v. Russell, Respondent..... 184

NON-REPAIR, LIABILITY OF CITY FOR.

See NUISANCE.

NOTICE OF ABANDONMENT.

See INSURANCE, MARINE, 6.

TO FORFEIT MINING AREAS.

See MINING LAW.

NUISANCE IN HIGHWAY.

The principal streets of Halifax were in such a condition from accumulation of ice and snow hardened into irregularities of surface that the plaintiff, owner of a line of omnibuses, had his vehicles injured and suffered loss of custom. The non-repair continued most of the winter and after full notice to the City authorities.

Held, 1st, that the City was liable for plaintiff's injuries; 2nd, that negligence had been proved; 3rd, that plaintiff was not guilty of contributory negligence in not using other streets instead of those complained of; 4th, that notice of action by plaintiff's attorney was sufficient and unobjectionable, although in the alternative as to amends being paid.

Where an individual or corporation is liable to indictment for non-repair, an action will lie at the suit of one who suffers special injury. Liability is not, in all cases, to be inferred from enactments placing the highway under defendant's control. The *obligation* must have been imposed on or transferred to defendant.

No distinction exists between non-feasance and mal-feasance, in relation to such liability.

Walker v. City of Halifax..... 371

OFFICERS OF THE CROWN, ACTION AGAINST.

By Revised Statutes, Chapter 36, section 15, "The financial and general management" of the Nova Scotia Hospital for the Insane is "vested in the Commissioner of Public Works and Mines," and, by section 47 of the same chapter, the title to property, and the lands belonging or attached to the same, "is confirmed and vested in the Commissioner of Public Works and Mines, for the time being, and his successors in office, in fee simple, for the purposes and uses of such hospital." An action of ejectment having been brought to recover possession of the premises, a motion was made to set aside the writ and proceedings or for a perpetual stay of the proceedings

on the following grounds:—1st. Because such action will not lie against the officers of the Crown or Government, and cannot be maintained against them in respect of such property as that sued for. 2nd. Because such action and proceedings cannot be taken against the Crown and its officers. 3rd. Because the defendants hold the property sued for herein as the officers of the Crown and Government and not otherwise.

The motion was refused.

Seem, that where the act vests the property in the officer of the Crown, ejectment to test the title will lie.

Kearney v. Creelman et al...... 228

ORDER OF FILIATION.

See POOR LAW, 1.

OVERSEERS OF POOR.

See POOR LAW.

PARTNER, SUIT BY AGAINST CO-PARTNER.

On the dissolution of a co-partnership between defendant and plaintiff, defendant agreed to assume the liabilities of the firm. Plaintiff and defendant were sued jointly by one of the partnership creditors. Defendant agreed with plaintiff that the latter should pay the debt, and that he would repay him the whole amount. Plaintiff paid the debt and sued defendant *in assumpsit*.

Held, that plaintiff could recover, notwithstanding the former relation of partnership.

Foyle v. Bingham..... 404

PARTNERSHIP, SUIT ON SETTLEMENT OF.

See PARTNER.

PAYMENT, PLEA OF.

See FREIGHT, INSURANCE OF.

PLAN, REJECTION OF.

See EVIDENCE.

PLEADINGS.

DECLARATION IN LIBEL.

See LIBEL.

NON EST FACTUM.

Defendants pleaded as to certain agreements alleged to have been made by them under seal that the alleged deeds were not their deeds, and they did not undertake and promise as alleged.

Held, that under R. S., c. 94, s. 152, an objection could not, under these pleas, be taken to the authenticity of the seals affixed to the agreement as the seals of the defendant company.

Gregory v. The Halifax and C. B. Railway and Coal Co. et al...... 436

PLEADINGS.

SET OFF ARISING AFTER ACTION.

To an action on a promissory note, defendant pleaded by way of set-off a judgment for a greater amount recovered against plaintiff by a third party and assigned to defendant after the commencement of plaintiff's action.

Held, that the plea was bad. Even if pleadable the plea could only be to the further maintenance of the action, and not in bar to the whole action.

Assuming the assignment to have been in good faith, defendant might possibly have got the benefit of it on application to the Court in the exercise of its equitable jurisdiction.

McDonald v. Neville..... 191

POOR LAW.

1. Defendant objected to an order of filiation made at the instance of the Overseers of the Poor for Maccan on the ground that, although the mother was resident at Maccan when the child was born, the legal settlement of the mother was the Township of Parraboro.

Held, that the father was liable to the plaintiff township, the words "likely to become chargeable to any township" being equivalent to "likely to need relief from any township."

Overseers of Poor v. Davidson..... 58

2. A pauper having a settlement in defendants' district was seized with fever in plaintiffs' district. Plaintiffs gave her relief, gave notice to defendants and had the pauper removed as soon as it could properly be done. They then brought action for the expenditure incurred previous to the removal.

Held, that the statute was not sufficiently clear and unambiguous to impose on defendants the expense of sustaining the pauper previous to removal.

Overseers of Poor, Bridgewater, v. Overseers of Poor, Port Medway.. 88

PRACTICE.

AFFIDAVIT FOR APPEAL FROM JUSTICE.

See infra APPEAL FROM JUSTICE'S COURT.

AMENDMENT.

See per JAMES, J., in *McKinnon v. McNeil*..... 25

See also VERDICT RENDERED BY MISTAKE.

AMENDMENT ON APPEAL.

In an action by and in the name of the guardian of a lunatic, for a debt due the lunatic, the defendant did not go into his defence, contending that the action was wrongly brought, and judgment in the County Court was given for plaintiff. On appeal, the Court allowed plaintiff to amend; and, defendants contending that there was a defence on the merits, a new trial was ordered, but without costs, first, because the new trial was an indulgence to defendant, as the Court might in such a case give judgment for the plaintiff on the amended record; secondly, because, had the defendant entered on his defence in the Court below, a new trial would possibly have been rendered unnecessary by his success.

Seaman v. Porter..... 292

PRACTICE.

APPEAL, AMENDMENT ON.

See supra, AMENDMENT ON APPEAL.

APPEAL DISMISSED FOR NON-PAYMENT OF COSTS.

Appeal dismissed, were appellant, having neglected to enter the appeal in time, obtained a rule to enter the cause on payment of costs, which appellant failed to pay.

Johnston v. McLean..... 91

APPEAL FROM COUNTY COURT.

There can be no appeal on a ground not taken below.

Andrews v. Landers..... 236

The Queen v. Miller..... 361

APPEAL FROM JUSTICES' COURT.

The affidavit for appeal from a Justice of the Peace, in civil cases, must be made before the Justice who tried the cause.

Curry v. Leeras..... 31

CERTIORARI.

1. A writ of *certiorari* was issued to remove a conviction under the *Canada Temperance Act*. The writ was allowed by a Commissioner, and it was not shown that there was no Supreme or County Court Judge in the County, (Acts of 1882, cap. 10, sec. 2.)

Held, that the writ must be set aside, as it was not shown that the Commissioner had jurisdiction to issue it.

Per McDONALD, C. J., and WEATHERBE, J., that the indorsement, "allowed, security having been first given and filed," was not sufficient.

Corbett v. O'Dell..... 144

2. Writ of *certiorari* quashed and *procedendo* awarded where there was no return day mentioned in the writ.

Devers v. Gavaza..... 167

CONVICTION.

Defendant was convicted of allowing his cattle to go at large in the township of Cornwallis.

Held, that the conviction was bad in that it did not set out the by-law or ordinance of the Sessions creating the offence; and that the objection was covered by the ground taken in the rule, that the conviction did not show any offence for which it could lawfully be made.

Starr v. Heales..... 84

COSTS, APPEAL DISMISSED ON NON-PAYMENT OF.

See supra, APPEAL DISMISSED, &c.

COUNSEL, RIGHT OF TO BE HEARD

The appellant's junior counsel opened in support of the appeal, and the Court announced that they would decide after consultation

whether it was necessary to call on the other side. The senior counsel then claimed a right to be heard in support of the appeal, but the Court refused to hear him.

Hubley v. Boak..... 82

DEFAULT OPENING JUDGMENT BY.

See infra, OPENING JUDGMENT.

DEFENCE ON THE MERITS.

The defendant, applying for security for costs on the ground of plaintiff's residence out of the jurisdiction, swore that the action was on a promissory note against defendant as an indorser, and on the common counts, that the defendant never was indebted as alleged, and had a good defence on the merits, and believed he would be able to substantiate a good defence; and, further, that plaintiff had previously sued for the same cause of action, in which defendant had obtained judgment, plaintiff not having given security for costs as ordered.

Held, that the appeal from the rule refusing the security must be dismissed.

Semble, that the defendant had not "*made it appear*" by affidavit that he had a good defence.

Eaves v. Darling..... 128

DEMURRER NOT ALLOWED TO GROUNDS OF DEFENCE.

Grounds of defence filed and served in the County Court are not subjects of demurrer.

Mahon v. Gammon..... 232

GENERAL VERDICT.

The jury found a general verdict for plaintiff, but, in answer to a question put to them by the Judge, found one of the issues raised by the pleadings for the defendant.

Held, that the general verdict for plaintiff must be set aside.

Per JAMES, J., that it could be amended.

McKinnon v. McNeill et al...... 25

GROUND IN RULE.

See supra CONVICTION.

IRREGULARITY.

See infra SERVICE OF SUMMONS.

IRREGULARITY, EFFECT OF ON COSTS.

Where the respondent succeeded on appeal, but there appeared to have been some irregularity on his part in the proceedings below, the extent and importance of which were uncertain, costs were not allowed.

Mahon v. Gammon..... 232

LACHES.

Rule *nisi* to rescind an order of a Judge at Chambers discharged where the motion was delayed and the delay not sufficiently accounted for.

Crittenden v. The Municipality of Guysborough..... 62

See also infra SERVICE OF SUMMONS.

PRACTICE.

LUNATIC, ACTION BY GUARDIAN OF.

In an action by, and in the name of the guardian of a lunatic, for a debt due the lunatic, the defendant did not go into the defence, contending that the action was wrongly brought, and judgment in the County Court was given for plaintiff. On appeal, the Court allowed plaintiff to amend; and, defendants contending that there was a defence on the merits, a new trial was ordered, but without costs, first, because the new trial was an indulgence to defendant, as the Court might in such a case give judgment for the plaintiff on the amended record; secondly, because had the defendant entered on his defence in the Court below, a new trial would possibly have been rendered unnecessary by his success.

Seaman v. Porter..... 292

MANDAMUS.

Defendants obtained an order to quash a writ of mandamus on grounds appearing on the face of the writ, together with other grounds appearing by affidavit. On the return day of the order defendants obtained from the Court *in banco* a rule discharging this order, giving defendants leave to move the Court on the grounds taken in the order *nisi*. Defendants moved the Court accordingly, and obtained a rule to quash the writ, which provided that the defendants should have ten days after the discharge of said rule to make their return to the writ.

Held, that the motion to quash should be made before the return day, and that the provision in the rule *nisi* giving time could not be said to have extended the return.

Held, as to other grounds taken in the rule, viz., that the application should have been made promptly, that no sufficient matter appeared in the writ, that other legal remedies existed, and that the writ required defendants to do an act exceeding their authority,—that these grounds could have been taken in showing cause to the rule *nisi* for the mandamus, and therefore could not form the ground of a motion to quash.

The further ground was taken that no valid order existed for the issue of the writ as the order was for a peremptory mandamus, and the writ was in the alternative.

Held, that as the Court understood, in granting the rule, that they were making a rule for a mandamus alternative, the matter was *res adjudicata*.

The Queen v. The Warden and Town Council of Dartmouth..... 173

MOTION TO RESCIND.

See supra, LATCHES.

NON-SUIT, VOLUNTARY.

On a motion for non-suit the learned Judge expressed the opinion that the plaintiff's evidence was extremely weak, but did not suggest that there was nothing for the jury. The plaintiff's counsel having thereupon offered to become non-suit if with leave to set it aside, which leave was given.

Held, that the non-suit was voluntary and could not be disturbed.

Oakes v. Keating et al..... 554

PRACTICE.

OPENING JUDGMENT.

Rule to open judgment by default refused where the defendant was fully aware of all the proceedings and failed to account for his delay in moving.

Cummings v. Gladwin 168

RES ADJUDICATA.

Plaintiff obtained an *ex parte* order extending the time for service of an election petition on the respondent, which, after argument of a rule *nisi* to rescind it, was rescinded because the grounds on which the original order extending the time had been granted were defective. Petitioner then made a second application and obtained a second *ex parte* order for extension of the time based upon facts which were fully known to the petitioner when he applied for the first order. Respondent, after the order *nisi* to set aside the second extension and the service thereunder had been obtained, filed preliminary objections.

Held, that the second order for extension could not be made on grounds known to the petitioner when he obtained the first order, and that respondent was not prevented by filing preliminary objections from contending that the service was bad, as there was no other course open to him. The rule was made absolute without costs on the authority of the *Queen v. Manchester and Leeds Railway Co.*
Dickie v. Woodworth 105

See also supra MANDAMUS.

RESCINDING ORDER.

See supra LACHES.

SECOND APPLICATION.

See supra RES ADJUDICATA.

SECURITY FOR COSTS.

1. An appeal was taken from an order of a County Court Judge discharging an order *nisi* for security for costs, where it was shown that the plaintiff, although resident out of the Province, was a native and a British subject and had considerable real and personal estate within the jurisdiction, and there was some evidence that she intended to return.

Held, that the granting or refusal of the stay of proceedings by the County Court Judge was a matter of discretion, and that the discretion had been rightly exercised by the Judge.

Card v. Weeks 93

2. The defendant, applying for security for costs on the ground of plaintiff's residence out of the jurisdiction, swore that the action was on a promissory note, against defendant as an indorser, and on the common counts, that the defendant never was indebted as alleged, and had a good defence on the merits, and believed he would be able to substantiate a good defence, and, further, that plaintiff had previously sued for the same cause of action, in which defendant had obtained judgment, plaintiff not having given security for costs as ordered.

Held, that the appeal from the rule refusing the security must be dismissed.

Semble, that defendant had not "made it appear" by affidavit that he had a good defence.

Elaves v. Darling 128

PRACTICE.

SERVICE OF SUMMONS.

Where a writ of summons was served more than six months after issue, and the defendant entered into negotiations for a settlement with knowledge of the service, and did not apply to set it aside for several weeks.

Held, that the application was too late.

Symonds v. Beckett et al. 396

SERVICE ON COMPANY OUT OF PROVINCE.

Plaintiff entered on the record a suggestion that the Canada Improvement Company, one of the defendants, was absent out of the Province when the writ of summons was issued, and on that account could not be served with process. The suggestion was not traversed and it was contended by defendants that it had not been proved at the trial, and, therefore, that plaintiff should have become non-suit under *Revised Statutes*, chap. 94, secs. 347 and 350, and, further, that the defendant could have been served under section 41 of the Canada Joint Stock Companies Clauses Act of 1869, (Chap. 12 of 1869,) made applicable to this company by Chap. 119 of 1872, sec. 9.

Gregory v. The Halifax and C. B. Railway and coal Co. et al. 436

STAY OF PROCEEDINGS.

An appeal was taken from an order of a County Court Judge discharging an order *nisi* for security for costs, where it was shown that the plaintiff, although resident out of the Province, was a native and a British subject and had considerable real and personal estate within the jurisdiction, and there was some evidence that she intended to return.

Held, that the granting or refusal of the stay of proceedings by the County Court Judge was a matter of discretion, and that the discretion had been rightly exercised by the Judge.

Card v. Weeks. 93

SUGGESTION.

Plaintiff entered on the record a suggestion that the Canada Improvement Company, one of the defendants, was absent out of the Province when the writ of summons was issued, and on that account could not be served with process. The suggestion was not traversed and it was contended by defendants that it had not been proved at the trial, and, therefore, that plaintiff should have become non-suit under *Revised Statutes*, chap. 94, secs. 347 and 350, and, further, that the defendant could have been served under section 41 of the Canada Joint Stock Companies Clauses Act of 1869, (Chap. 12 of 1869,) made applicable to this company by Chap. 119 of 1872, sec. 9.

Held, that the suggestion, if the truth of it was denied, should have been traversed by defendants, and that the section of the Canada Joint Stock Companies Clauses Act referred to did not enable service to be made by any other than the accustomed officer, nor beyond the jurisdiction of the Court.

Gregory v. The Halifax and C. B. Railway and Coal Co. et al. 436

SUMMONS, SERVICE OF.

See supra, SERVICE OF SUMMONS.

PRELIMINARY OBJECTIONS, EFFECT OF FILING.

See PRACTICE—RES ADJUDICATA.

PRESCRIPTION.

See WATER COURSE.

PRESENTATION FOR PAYMENT.

Two promissory notes made payable at the Bank of Nova Scotia were placed in the hands of the agent of the Bank at Kentville for collection. The agent testified that the notes in question "were in the head office at Halifax when they became due, and after they became due were returned to me." There was no evidence that the defendant or any one representing him was at the place where the notes were made payable to meet his engagement.

Held, that the Bank, under the evidence, was the agent of the payee to receive payment and not of the maker to pay. The judgment for plaintiff below was confirmed and the rule discharged with costs.

Pullen v. Sanford..... 242

PRESUMPTION AS TO ADVANCEMENT.

See ADVANCEMENT.

PRINCIPAL AND AGENT.

Plaintiff hired a vessel to N. & Co. to carry a full cargo from Halifax to Liverpool, the freight to be £850, and the plaintiff to take the freight and primage, as per bills of lading, to the extent of £850, in final payment at Halifax, without recourse on N. & Co., whose responsibility was to cease as soon as the goods were on board, the vessel holding a lien on the cargo for freight. The deficiency, if any, was to be paid by N. & Co., and the excess over £850 to be provided for by master's draft against freight. Of the freight on the cargo, £352 was payable by third persons, and £695 7s. 8d. by N. & Co., making in all £1,047 7s. 8d., being an excess of £197 7s. 8d., for which the master accepted, payable at the office of defendant, who, in this transaction, was the agent of the plaintiff. The acceptance was endorsed before maturity to P. & B., for value. At Liverpool the master gave an order in writing to defendant's house to pay the draft out of the freight first collected. Defendant only admitted having collected £517 8s. 0d., of which he paid to the captain £35 15s. 7d., the balance being accounted for thus: "Disbursements, £284 4s. 0d.; paid acceptance of N. & Co., £197 7s. 8d." The captain, after learning the items of the account, some of which were professedly unsettled, being stated as "about" the sums set down, gave a receipt for the £35 15s. 7d., but shortly afterwards wrote defendant, disputing the correctness of the account, and expressly notifying the defendant not to part with the £197 7s. 8d. deducted from the freight.

Held, that the receipt could not be relied on as conclusive in an action by the plaintiff against defendant for money had and received, and that the items of disbursements could only be given under a plea of set-off.

Held, further, that the endorsement of the acceptance to P. & B. gave them no lien on the fund in Liverpool, and that they could not complain of the revocation of the captain's order to pay the draft; and that, apart from this ground altogether, the defendant, as the agent of the plaintiff, was bound to account to his principals, and

could not set up the rights of third persons in an action by the principal.

Held, also, that the action for money received was properly brought by the plaintiff as principal against the defendant as his agent.

McFairidge et al. v. Carvill..... 236

PRIVILEGE.

See LIBEL.

PRIVILEGED COMMUNICATION.

See LIBEL.

PROBATE COURT, COSTS ON APPEAL FROM.

See COSTS, &c.

PROMISSORY NOTE.

See PRESENTATION FOR PAYMENT.

PUBLIC AGENTS, CONTRACT BY.

At a meeting of the inhabitants of Sydney defendants were appointed a committee to act as a Board of Health, in consequence of an outbreak of smallpox. They were subsequently appointed as such Board by the Lieutenant-Governor, under Chapter 29, *R. S.*, (4th Series,) and made a contract with plaintiff for medical services while the disease should continue in the place, at a fixed rate *per diem*. They dispensed with his services before the disease had been eradicated. In an action for wrongful dismissal the jury found that plaintiff did not know, at the time of the contract, of the appointment by the Lieutenant-Governor of the defendants to be a Board of Health, and that the contract was made with them in their individual capacity.

Held, that the action was *ex contractu*, that defendants, whether acting *intra vires* or *ultra vires* of their authority as a Board of Health, were to be regarded as public agents, not individually liable on the contract which they had made on behalf of the public, and that the findings of the jury were not warranted by evidence that the contract was made by defendants with plaintiff in the ordinary way in which a contract would be made by public agents. Verdict for plaintiff set aside.

McKay v. Moore et al...... 326

PUBLICATION, EVIDENCE OF.

See LIBEL.

RECEIPT NOT CONCLUSIVE.

See PRINCIPAL AND AGENT.

RECORD.

See VARIANCE.

REGISTRY OF JUDGMENT.

See JUDGMENT.

REMOVAL, EXPENSES PREVIOUS TO.

See POOR LAW, 2.

RENT, LIEN FOR.

Section 7 of Chapter 107, *Revised Statutes*, (4th Series,) providing that no goods shall be removed from the premises under execution until one year's rent, or a rateable part thereof be paid to the landlord, does not apply to goods taken under attachment under the Absconding Debtors Act.

Miller v. Ling..... 135

REPLEVIN.

Defendant, having dissolved his connection with the firm of C. & W. Anderson, ordered the goods in question from plaintiff. The agent forwarded the order in the name of C. W. Anderson instead of W. C. Anderson, (the defendant's name,) and plaintiffs sent the goods addressed to C. & W. Anderson, who refused to receive them. They afterwards came into possession of defendant, and at the time of the seizure were in the store of defendant, where the business was being conducted by assignees, under a bill of sale, conveying all defendant's property. When the demand was made, defendant was merely a salesman for the assignees, and told the plaintiff's agent that he could not give up the goods as they were not his.

Held, that the plaintiff could not succeed in replevin, as the goods were not, at the time of the seizure, in the possession of the defendant, or at least that there was not sufficient evidence to the contrary to enable the Court to set aside the verdict found by the Judge without jury, for the defendant.

WEATHERBE, J., dissenting.

Marshall v. Anderson..... 432

See also BILL OF SALE.

RES ADJUDICATA.

See PRACTICE—Mandamus.

See also PRACTICE—*res adjudicata*.

RETURN DAY IN WRIT OF CERTIORARI.

See PRACTICE—Certiorari 2.

ROAD, PROPERTY BOUNDING ON.

See EJECTMENT, 2.

SALE OF GOODS.

Plaintiff contracted to deliver to defendant a mowing machine, to be delivered in a satisfactory working condition, and brought the machine to defendant's field where, in the course of a trial which he proceeded to make, a wheel became broken, which plaintiff promised to replace. Five witnesses swore that the wheel was a material part of the machine, and there was some evidence that it was not.

Held, that plaintiff could not recover the price, as the machine was never delivered in a satisfactory working condition.

Lawlor v. Mumford..... 35

SCHEME OF ARRANGEMENT.

See BRITISH NORTH AMERICA ACT.

SECRETARY OF SCHOOL TRUSTEES, NOT DISQUALIFIED
AS COUNTY COUNCILLOR.

See MUNICIPAL ELECTION.

SET-OFF, PLEA OF, ARISING AFTER ACTION.

See PLEADINGS—Set off.

SHARESMAN, INTEREST OF.

See FISHING VOYAGE.

SHERIFF, ACTION AGAINST, FOR NEGLIGENCE.

Plaintiffs, having recovered a judgment and issued an execution against the judgment debtors, were about bringing action against the defendant, (the Sheriff,) for negligence in the execution of the writ, whereupon defendant, by his attorneys, wrote plaintiffs asking permission to be allowed to issue an execution against the debtors, in order that the Sheriff "might be able to find sufficient property to save himself from loss." Plaintiffs gave the permission to defendant to issue the execution "on his own responsibility, and to be considered totally irrespective and apart from the suit we are now about to bring against the Sheriff." The execution was accordingly issued and \$200 collected, which the Sheriff declined to pay over until the suit for damages was determined. An action was brought for money had and received.

Held, that the verdict for defendant must be sustained.

Per WEATHERBE, J.—That under the correspondence the money collected was to be held for the purpose of indemnifying the defendant from loss in the proceedings to be taken against him, and that, until the matter was settled, plaintiffs were estopped from claiming the money so collected.

Bank of British North America v. Bell..... 121

SNOW ON STREETS, A NUISANCE.

See NUISANCE.

SPECIAL PROPERTY RETAINED BY VENDOR.

See INSURANCE, MARINE, 5.

STOCK, CALLS ON, ACTION FOR.

See CALLS, ACTION FOR.

STREET, PROPERTY BOUNDING ON.

See EJECTMENT, 2.

STREETS, NUISANCE IN.

See NUISANCE.

SURETY, CONTRIBUTION BY.

See CONTRIBUTION BY Co-SURETY.

TOTAL LOSS.

See INSURANCE, MARINE.

TRANSFER OF BANK STOCK.

See CALLS, ACTION FOR.

TROVER, VALUE OF GOODS OVER \$200.

Defendant was sued in the County Court in an action of trover for goods and pleaded that the goods alleged to have been converted were of the value of \$800 and upwards and the County Court had no jurisdiction. The plea was demurred to and held to be good by the County Court Judge, who was about proceeding to try the case when a rule *nisi* was taken at the instance of defendants for a writ of prohibition.

Held, that the plea was not a good plea, as the damages claimed were only \$200 and the measure of damages in trover was not necessarily the value of the goods; and that, the Court having jurisdiction, the writ of prohibition could not be granted.

O'Toole et al. v. Wallace et al. 357

_____, FOR CROWN PROPERTY.

See CROWN PROPERTY.

ULTRA VIRES.

See BRITISH NORTH AMERICA ACT.

VARIANCE.

Plaintiff sued on a money bond. There was a variance between the declaration and the proof, the declaration setting out the words of the condition upon performance of which the bond was to become void instead of the obligatory part of the bond, and the plaintiff was nonsuited with a rule to set aside the non-suit. On the first day of term plaintiff obtained a rule *nisi* for an amendment of the declaration and that a new trial be granted, because the Judge on the trial had improperly refused to grant the amendment. At the argument, plaintiff moved to discharge this rule with leave to move for another similar to it, but adding the words "on reading the minutes." The affidavit of plaintiff's counsel stated that the Judge had refused leave to insert, as one of the grounds in the rule, that the amendment had been refused. This was contradicted.

Held, that the rule *nisi* must be discharged as the Judge's minutes were conclusive as to what took place at the trial, and plaintiff had his remedy under the statute for the alleged refusal to grant a rule; that the plaintiff was properly non-suited on account of the variance, and the non-suit could not be set aside for the alleged refusal of the Judge to grant the amendment, even assuming plaintiff's account of the matter to be correct.

The declaration also contained a count on an award in a prior suit on the same bond. The said suit was brought for the first instalment, but the arbitrators to whom the matter was referred by agreement awarded the whole amount of the bond to the plaintiff. The present action was for the third instalment. A record was made up in the first suit setting out the agreement and award, and was not filed until sometime after the bringing of this suit.

Held, that the record was inadmissible.

Halifax Banking Company v. Worrall et al. 483

VERDICT, EFFECT OF.

See INSURANCE, MARINE.

———, GROUNDS FOR DISTURBING.

See LIBEL.

———, INTEREST ADDED TO.

See Gregory v. Halifax and C. B. Railway Co. 436

———, RENDERED BY MISTAKE, JURISDICTION TO SET ASIDE.

In an action for maliciously procuring an execution to be issued against the plaintiff, the judge put to the jury the question whether the defendant issued the execution knowing or believing that nothing was due to him by the plaintiff; if not, the verdict to be for the defendant. The jury answered the question in the negative, but found a verdict for plaintiff. The Judge on circuit, on motion, ordered a verdict to be entered for defendant with leave to move. After argument of the rule *nisi* to set aside the verdict for defendant,

Held, that there was no authority, after the verdict for plaintiff was rendered, to enter a verdict for defendant, and that the Court *in banc* had jurisdiction to grant a rule *nisi* to set it aside.

McKay v. Woodill. 55

WAIVER OF FORFEITURE.

See FORFEITURE OF LEASE.

WATERCOURSE, DEDICATION OF.

Action of trespass against a Surveyor of Highways for cutting a ditch through plaintiff's land to carry off water from the highway, and for filling up another ditch in the highway, and thereby causing water to flow over plaintiff's land. Defence; To the first charge: That the former owner of plaintiff's land helped to construct the highway, and agreed to the cutting of the ditch for carrying off the water from the highway; that the ditch had been in use for that purpose for thirty-seven years; that occasional obstructions, during that time, had been removed by the Surveyor for the time being; that the ditch followed the natural course for the flow of water from the highway; and that the cutting complained of was a clearing out of obstructions which plaintiff had placed in the ditch a short time before. The defence to the second complaint was that the other ditch, was a ditch alongside the highway, too deep to be safe, and that the defendant, as such Surveyor, partially filled it up, as he had a right to do. At the trial the Judge excluded the evidence of defence to the first complaint and a verdict, under his direction, passed for plaintiff.

Held, 1st. That the long use of the drain through plaintiff's land was evidence from which a jury might infer a dedication by deed, though there was evidence of an assent to such use more than twenty years ago. 2nd. That the defendant had a right, as such Surveyor, to close or alter the ditches along the highway, as a private proprietor of land in the same situation might. Verdict set aside accordingly.

The following propositions were affirmed:—

That as to water not flowing in defined channels the flowing does not warrant the presumption of a grant.

That as the owner of the high land cannot collect such waters in drains and precipitate them on the land of another proprietor below, a grant may be presumed where this has been done as of right for twenty years, and this notwithstanding the Prescription Act, Chap. 100, R. S., 4th Series, Sec. 28.

That evidence that use began prior to twenty years by consent is merely evidence against a presumption of a grant, and may be met by counter evidence that the use was afterwards as of right, &c., for twenty years.

That the consent by parol to the establishment of an artificial course, made more than twenty years ago, is not conclusive that the subsequent twenty years use was not by grant because such a right could not be conferred by parol alone.

That a dedication to the public of an easement may be inferred from the circumstances such as warrant the inference of a grant in the case of a private person enjoying such easement.

That the surface and ditches of a highway may be altered without liability to an action by the adjacent proprietors.

Harrison v. Harrison..... 338

WEIGHT OF EVIDENCE.

See BURDEN OF PROOF.

WORDS, ACTION FOR.

See LIBEL.



Wyoming
State
Library

ON THE
MOUNTAIN
TOP
OF THE
MOUNTAIN
TOP

